AN

INTRODUCTION

TO

THE SCIENCE OF THE LAW;

SHEWING

THE ADVANTAGES

OF A

LAW EDUCATION,

GROUNDED ON

THE LEARNING OF LORD COKE's COMMENTARIES

UPON LITTLETON's TENURES,

OR, AS THEY ARE CALLED BY WAY OF DISTINCTION,

"The Institute,"

WITH A VIEW EITHER TO

THE BAR, THE SENATE,

OR THE

DUTIES OF MAGISTRACY.

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Moniti meliora sequamur!

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PREFACE.

It is not exclusively to the Student who intends to follow *the practice* of the law, but to every Gentleman, every liberal Scholar in the kingdom, who is not insensible how necessary it is that he should apply himself, in order to obtain at least a general acquaintance with the nature of the local constitutions of his native land, that I dedicate the following pages. The importance, indeed, of this interesting branch of instruction, *in every situation of life*, is universally acknowledged; but the way, in which we ought to endeavour to attain to it, is a subject of much difference of opinion, even among professional men, and presents to the unassisted and unprepared student a constant source of extreme difficulty and discouragement.

For my own part, oppressed with the humiliating disappointment, under which I had vainly laboured to remove the inexperience of my earlier years, and when, (as Sir Henry Spelman expresses

himself upon a like occasion,) *excidit mihi fateor animus*, I should have felt most grateful to the man who would have fixed my indecision by the suggestions of his riper judgment, or from whose experience I could have derived one ray of light. It is to those, who may probably now entertain the same feelings, that I offer the following Considerations of the Plan of Education recommended by that distinguished judge, Lord Chief Justice Reeve (1), and which I originally proposed to myself as a sort of occupation in captivity during the memorable and for ever infamous persecution of the detained British hostages in France. In the shape in which they are now offered to the reader, they will at least serve to demonstrate, that *the law is not a mere series of unconnected decrees and ordinances, but, in the strictest sense of the word, a science founded on principle, and claiming an exalted rank in the empire of reason;* and they will, at the same time, exemplify an easy and certain method of ensuring a due proficiency in this course of study, to those who may desire to be-

(1) Sir Thomas Reeve was Lord Ch. Justice of the Common Pleas, in the early part of the reign of George II. See his advice to his nephew, on the study of the law, in Hargrave's Collectanea Juridica, vol. I. p. 79. *et seq.*

nefit by it, with a view either to the Bar, to the Senate, or to the duties of Magistracy.

——— Fungor vice cotis, acutum
Reddere.

And here I must also beg leave (as a privilege of which authors not unusually avail themselves under the same circumstances,) to acknowledge myself much indebted for the explanation of some of the most difficult and obscure passages in "the Institute," to the assistance of an excellent and learned friend, at that time my fellow prisoner at Verdun, who has been long known and distinguished in the political world, in which he has chiefly moved, by his universal and profound erudition in this branch of science (2). The desire of benefiting by instruction is not without praise, but they who assist us in it are entitled to our warmest gratitude.

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(2) John Nicholls, Esq. formerly member of parliament for Tregony.

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56, —— 1, for "principal" read *principle.*
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INTRODUCTION

TO

THE SCIENCE OF THE LAW,

&c. &c.

UPON questions of difficulty, in which others are equally involved with us, we naturally direct our first attention to the practice of "the many," and are generally much more disposed to assent to its propriety, than to be at the pains of convincing ourselves of its merits. From the influence of this popular way of thinking, a man will conform himself to the grossest errors, or incur the most unnecessary and often fatal embarrassments with unenquiring indolence and inconsideration. He will be apt to disregard the silent testimony of his proper reason and judgment, and seeing the resignation, which is shown by others, under the same circumstances, he will consider it as a sort of excuse, at least in his own eyes, for his particular folly or supineness.

It is more particularly in the prosecution of that professional science, of which we are now treating, that we see the inconvenience, and extreme danger of thus blindly falling into the common practice. There hardly indeed passes a day, which does not produce the repetition of the same question;—what plan, what course of reading would you recommend to us, in order that we may be competently instructed in the laws, and local constitutions of our native land? A question upon which depends

the most important and valuable branch of liberal and polite learning, and which is personally interesting, not to every professional reader alone, but to every gentleman and scholar in the kingdom.

I presume then, with all due deference, from a knowledge of the inconveniences, which, in common with every unassisted beginner, I have had to contend with, in the prosecution of this course of study, that the discussion of the proposed plan of education, recommended to us by one of our ablest and most eminent judges, will be not unacceptable to those who are desirous of attaining to this branch of instruction. Such is, in few words, the object of the following publication; and, I trust, that the more candid reader will impute it less to the vanity of being an author, that I give it under my own name, than to a wish to evince the sincerity with which I offer it, and to shew myself responsible for its accuracy.

The profession, which of all others is more peculiarly the province of reason and of intellect, and affords the most extensive field for the exercise of the energetic powers of "the mind," is unquestionably that which we understand, in one word, by "the bar." In many other paths of life, (for it is not necessary that we should speak of any one in particular,) a man may be advanced by other talents than his own: he may have many a better recommendation in his favour than that for which he would be indebted to his own exertions, and an acquired patronage may supersede the necessity of deserving it. The profession of the law, on the contrary, yields no tributary honours to the canvassings of affection, nor affords its unsullied laurels to be prostituted to the fugitive and accidental pretensions of adventitious patronage. The reliance of the law student must be on his own strength;

he must rise by his own single proficiency; he must be the artificer of his own fortune;—neither, indeed, is there any other profession in which more diligent and persevering application is required, or which, in the exercise of its higher functions, demands more extraordinary efforts of quickness and subtilty of apprehension, of vigour and versatility of intellect, of solidity of judgment, of accurate and profound reasoning, and of delicacy and precision of expression. It is not to be minutely conversant in *the letter* and *the practice* of the law alone, in which the advantage of a law education principally consists, but rather in the attainment, by long study and meditation, of those superior qualifications of an enlarged and enlightened understanding, which are necessary to fulfil with dignity the functions of a lawyer, whether to aid, by the wisdom of his counsels, the dispensations of administrative justice, or to defend the life, the honour, and the fortune of his clients, and to render the cause of truth and innocence triumphant.

But let us here pause a moment, to consider of the means by which we may, ultimately, attain to this high professional merit and desired improvement of education. What scheme,—what plan of study shall we adopt, in order to arrive at it? We little think of the extent of the inconvenience we incur when we embark upon this new element, to launch as it were into a new sphere of science, with no public directions in what course to pursue our studies, and with no private assistance to remove the distresses and difficulties which always embarrass the beginner!

Indeed, when we reflect upon this single circumstance, we shall find it to be easily accounted for, that we are exposed to more frequent disappointments and miscar-

riages in this particular line of life than in any other. We all set out with the same land of promise before us, and not unfrequently, (I apprehend,) with the same degree of personal vanity and confidence in the expectation of reaching it. But the scene changes as we advance: increasing doubts insensibly overcloud the prospect which was at first so inspiring, till meeting with an incessant train of unforeseen obstacles, we are kept in a constant state of the most discouraging uncertainty and conjecture; we cannot choose, but guess, at what we have not experience enough to see in a clearer point of view, and at every successive question that arises, we find new subject for surprise and perplexity.

It is this inconvenience of having neither fixed directions to pursue, nor particular assistance to recur to, under encreasing difficulties and embarrassments, that gives occasion to the immense disproportion there is between "the many" who enrol themselves in this learned and honourable profession, and "the few" who have the good fortune to succeed in it. The eventual disappointments we complain of, have no other than this foundation: *inde mali labes*, there lies the root of the disease; but, like the inexpert physician, who loses his labour upon the symptomatic, while he overlooks the principal disorder, we lament the difficulties we are exposed to, and yet persist to follow a plan of education in which they are radically inherent. For such in fact I take to be the prevailing system (as I shall endeavour more fully to demonstrate in the course of the succeeding pages) of reading and common-placing Blackstone's Commentaries, and of attending a special pleader's or attorney's office for some two or three years, to copy precedents. When we afterwards emerge into the profession from this officinal purgatory, how few of our number reach the happy plains:—

——————— Exinde per amplum
Mittimur Elysium, et pauci læta arva tenemus!

It is, indeed, far from my intention to presume to insinuate that those professional gentlemen who have pupils under their care, do not do them ample justice; but, independently of the avocations of actual business, by which they are principally occupied, it is not expected of them, according to the prevailing system, that they should give lectures. We must take the general usage as it is, and not build upon those rare instances which are but exceptions to it. Men will not read with their pupils, when they can set them down quietly at the desk to copy precedents;—they will not, unsolicited, volunteer the arduous undertaking of developing the science of the law, of explaining the theory of its principles, of demonstrating the results, elucidating the analogies, and in short, of clearing away each technical difficulty by discussion. How much easier is it to leave the student to the exercise of his own industry, to copy precedents of which no discussion is required, and to read and common-place Blackstone's Commentaries, which, as far as they go, have need of no explanation! An inexperienced beginner in the profession commences his education under these auspices. Like the good monk who reads his breviary as he finds it, he believes that this is the best of all possible plans to be adopted, and the *ne plus ultrà* of professional learning:—

Beyond this flood a frozen continent
Lies dark and wild, beat with perpetual storms
Of tempest and dire hail!

But this contracted and illiberal notion of the nature of an introduction to the science of the law, has a tendency, among its many other ill consequences, to bring this branch of instruction into discredit and disesteem. It

tends to confound the lawyer with the practitioner, the liberal scholar with the mechanic, and consequently to render an application to this course of study both an irksome and an endless labour, distasteful to the man of science, and fit for those only whose intention it is to follow the law as a profession.

That men, who in all other respects possess an acknowledged superiority in point of education, should be thus precluded, as it were, from this most interesting and important species of information,—that they should be shut out from the knowledge of the local constitutions of their native land, through a prejudiced misapprehension of the means of attaining it, is at once a most humiliating and disgraceful spectacle, dishonourable and injurious to the individual, and inconvenient and mischievous to the community. The former, indeed, will in many instances be found to be wanting to himself, both as a British gentleman and a British subject; he will frequently be unequal to those ordinary practical duties, in the conscientious discharge of which consists the essential difference between the good member of society and the bad; he is no fit person to be referred to in the character of an arbitrator; he is unworthy to be confided in as the appointed guardian or trustee of a common family settlement! The same humiliating incapacity which unfits him for the discharge of these private duties, renders him an equally insignificant and useless member of society upon occasions of a more public nature. The juror, upon whose solemn verdict depends the adjudication of the property or the disposal of the lives of his fellow subjects, has not unfrequently to decide complicated questions both *of law* and *fact*, of which a more than ordinary degree of legal skill and judgment is necessarily required in the solution. In gentlemen appointed to fill the commission of the

peace, (a situation in which they have such ample power to maintain the good order of their neighbourhood,) a want of instruction in this species of learning, is confessedly still more inconsistent and inexcusable. Will the magistrate who misunderstands his business or misconceives his authority, administer legal and effectual justice; or will he not rather be the object of the contempt of his inferiors, and expose himself to the censure of those to whom he is accountable for his conduct? The inconvenience increases in proportion as the sphere of action is enlarged. The man who has not legal skill and judgment enough to serve with ability upon a jury, or to act as a justice of the peace, of how much less ability is he to represent his country in parliament, and to fulfil the more arduous and comprehensive duties of statesman and legislator!—So necessary is it that every man of rank and fortune in the kingdom should apply himself by a regular and methodical course of study, to acquire at least a competent knowledge of the nature and principles of the laws and the constitution of his country!

But there is likewise another point of view in which the proposed lucubrations have a much more extensive influence than we are apt at first sight to be aware of, and may be attended with the happiest advantages.—They eminently invigorate and fortify the mind's noblest faculty—the power of attention; they discipline the understanding, excite discrimination, give activity and acuteness to the apprehension, and correct and mature the judgment. They teach us to think and to reason in our youth, and will serve to employ us, and to render us useful to others in old age. In prosperity they grace and embellish, in adversity they afford us comfort and support. There is no profession, no situation in life, in

which they do not at some time or other come into use: they proceed with us through every vicissitude, attend us in every walk, and imperceptibly nourish in our minds that virtuous self-dependence which is the foundation of whatever is dignified in character, and the parent of all great and noble resolutions.

Neither is it in the improvement of the understanding alone that we experience the advantages to be derived from this course of study; it tends to improve the heart equally, and has a visible influence in meliorating and determining the moral character. We insensibly awaken to better feelings, and conceive a livelier and higher sense of all our social and civil duties, from being impressed with the evidences of truth and reason, upon which the knowledge of the science of the law depends. Perhaps the truth of this remark, in which there is neither prejudice nor enthusiasm, may be thus accounted for: in the study of the mathematics, for example, if we take any primary maxim or received truism, as "*that two things which are equal to a third, are equal to each other, or that equals being taken from equals, equals will remain,*" the conviction which it produces operates merely upon the intellect, and has no immediate influence upon us in our views of men and things as members of society. But the principles upon which the science of the law depends, are in this respect widely different: the perception for instance, of the degree of *civil* obligation we are under, "to live honourably, to do wrong to none, and to render to every man what is due to him," (which are three fundamental maxims(1) in the theory of judicial or legal reasoning,) not

(1) Juris præcepta sunt hæc,—honestè vivere, alterum non lædere, et suum cuique tribuere. Inst. Civ. Jur. lib. 1. c. 3.

only enlarges and informs the mind, but tends, at the same time, to meliorate and determine the moral character. In the progress of this interesting investigation, and the resulting conviction to which it leads, of the equitable policy of each decision or rule of law, the student will, therefore, not only have his understanding enlightened and his mind improved, but will infallibly become, at the same time, both a better man and better citizen. I conclude, that the course of study which possesses these peculiar advantages, is rather to be esteemed and attended to, for the purposes of education in general, than all the learning in the world besides. *For I regard not the most exalted faculties of the human mind as a gift worthy the Divinity, nor any assistance in the improvement of them as a subject of gratitude to my fellow-creatures, but from a conviction that to inform the understanding corrects and enlarges the heart.*

To the student who intends to follow *the practice* of the law, there are likewise further considerations to be offered, and such as none ever neglected with impunity. The obligations which are incurred at our own discretion, are those of all others of which we are to be the least excused for failing in the observance; and that which was before incumbent upon us, becomes doubly so from being identified with the discharge of a professional duty. I would ask then, have we taken any and what steps, in order to prepare ourselves to fulfil the duties of this self-created responsibility? Shall we set out, for instance, independently of all systems, and without having any fixed plan before us, relying with the unprofessional and unlearned reader upon the elements of the law, as we find them recapitulated in Blackstone? Or it is the better way, do we imagine, to enter at once upon the technical part, or, as it is sometimes called, the *business* of the law,

expecting to emerge forsooth from the desk to science, and deferring in the meantime the investigation of each difficult or doubtful doctrine, to be ascertained at any future period when we may happen to have occasion for it in practice? This, indeed, would be to plunge into the very error which has been constantly deprecated by all our best and most approved lawyers, and especially by Lord Coke himself, who ceases not to warn and to conjure the student (in those pithy and quaint words which are therefore more likely to impress themselves upon the memory) against the "*præpropera praxis*," and the "*præpostera lectio*[a]." From the expectations we are apt to form of our infant talents, and, perhaps, from an eagerness (which is still more natural to us) to meet the expectations of others, we almost insensibly fall into this fatal error; hurrying into the profession as if the practitioner must be of course the lawyer, when, alas! we have hardly yet science enough to discuss an ordinary marriage settlement, or to analyze a common report with accuracy. *Modus mihi quidam videtur tenendus, ne quæ præpropere distringatur immatura frons, et quicquid est illud adhuc acerbum proferatur. Nam inde et contemptus operis innascitur, et fundamenta jaciuntur impudentiæ, et (quod est ubique perniciosissimum) prævenit vires fiducia*[b].

It is true, that experience does not always come with years, neither are grey hairs and a furrowed countenance infallible marks of superior discernment and learning. But there is something so preposterous in the premature confidence of the beardless lawyer, that the very name of the thing alone seems to carry with it an apparent insinuation of ridicule. Do not let us deceive ourselves. Professional instruction is no more to be forestalled, than

[a] Co. Litt. 70. b.

[b] Quinct. lib. 12. c. 6.

it is to be dispensed with. It is not the desultory superficial smattering which a man may pick up any where or every where, but the slow-paced erudition which grows out of much patient reading and reflection. It implies the "*viginti annorum lucubrationes*,"—the results of the study and meditation of a long series of years. To affect to hurry over, with slovenly inconsideration, this vast and profound learning, betrays an entire ignorance both of the nature and principles of it, and is one of the last efforts of indiscretion and puerile vanity. They were lawyers such as these (I ween) that Cicero alludes to in his Oration for Muræna, when he says "if you provoke me I will make myself a lawyer in three days." *Si mihi stomachum moveritis, triduò me jurisconsultum esse profitebor.*

With respect, indeed, to the system *of copying precedents and filling up the marginal references in Blackstone's Commentaries*, there is no such apparent defect (it must be allowed) in the quantity of either time or labour which is usually bestowed upon it. The only objection to be found, is in the resulting inconvenience, "that after having regularly gone through the prescribed probation, the student has still the same irksome and endless prospect before him—the same doubts to perplex—the same difficulties to embarrass." And here, perhaps, it may be necessary to explain, that Blackstone's Commentaries were never intended to be an *institute for educating and forming lawyers*. On the contrary, if we examine them in this point of view, there can be nothing more circumscribed and incomplete, than the information they contain, nor more superficial and uninstitutional than their manner of treating it; and, which is still more distressing to the student, they abound with contradictions and professional errors. Of these, indeed, I am aware that a very large pro-

portion has been already pointed out or corrected in the later editions, and much useful learning has been supplied by the labour of annotation (2). This, however, is by no means the *principal ground* upon which I contend against the propriety of recommending the study of Blackstone's

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(2) In the last much-improved edition of Blackstone's Commentaries, by Mr. Christian, the student will have at least the benefit of being no longer puzzled with those originally mistaken or exploded doctrines, "that contracts made with a minor are not binding upon a person of full age, (B. C. 1. 436.); that the daughter of a Jew has not the same claim to maintenance, as every other subject, (B. C. 1. 449.); that there can be no arrest without corporal seizing or touching, (B. C. 3. 288.); that the horse, which a man is riding at the time, may be distrained and led away to the pound, notwithstanding the rider, (B. C. 3. 8.); that under a commission of bankrupt, the lord shall be allowed his arrears of rent in preference to the other creditors, (B. C. 2. 489.) that the right of a donative is for ever destroyed by a presentation, (B. C. 2. 23.); that an advowson or right of patronage may be conveyed by a verbal grant, (B. C. 2. 22.); that the principle upon which waifs and estrays are become the property of the crown, is that of their being *bona vacantia*, (B. C. 1. 299.); that the sole property of all the game in England is vested in the king alone, (B. C. 4. 415.); and that no persons, of what property or distinction soever, are entitled to kill game, even upon their own estates, without the grant of a franchise," (B. C. 4. 174.) and so forth. At the same time, supposing (which is certainly far from being the case) that the learned editor has not in any single instance overlooked a mistake or misrepresentation of any kind which called for explanation or correction, still (I apprehend) the objections which are here suggested would stand upon the same ground; there would still remain the same substantial argument in support of them. He has industriously repaired, no doubt, and has often illuminated the

Commentaries as the most advisable method of educating and forming men to be lawyers. They are not the supervenient inaccuracies which are to be remarked in them, that I principally object to, but their *total misapplication* in opposition to what the learned commentator himself designed, to a purpose to which they are in every point of view wholly inadequate. In proceeding to show that this opinion has not been unwarrantably concluded, I shall also expose, as far as I am able, the truly absurd system (by which it has usually been accompanied) of copy-precedents in an office;—a drudgery at which common sense revolts, and which is equally unscientific and unlawyer-like. But I shall beg leave to preface the observations I may have to offer upon this part of my subject by a few introductory remarks upon the nature of *the reasoning theory*, or common sense of the law; for if it were not from some strange misunderstanding in this particular, there would not, I apprehend, be the occasion which there now is, to say any thing in its vindication. That the means of acquiring may be fairly estimated, let us first understand each other with respect to the quality of the thing to be acquired.

In the first place, then, it is to be premised, that the ground-work of our whole system of civil or municipal jurisprudence, is that which we usually call, in one word, "the common law," and which implies both the written statutes of the realm, and the unwritten received customs and usages together, the *lex scripta et non scripta:*

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fabric; but has he placed it upon a wider and deeper basis? Has he extended its dimensions? Has he obviated the inherent inconvenience of a circumscribed and defective accommodation?

and it is, therefore, indifferently called "common law," or "common right," being common to every one without any particular act or reservation of his own (3).

The student who proposes to enter upon this course of study, will, therefore, in the first place, have to direct his

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(3). The "common law" has divers meanings. In its proper or technical sense, it signifies the laws of this realm as they have been immemorially received and holden for such, without the intervention of any particular statute to enforce them. Thus we say, "the tenant for life or years was not punishable for waste at the common law before the statute of Gloucester; but the tenant by the curtesy and tenant in dower were punishable for waste by the common law, that is by the usage and custom of the realm, before the said statute of Gloucester was enacted, (Co. Litt. 53. b.) And the reason for the above distinction was, that tenant for life and tenant for years were always supposed to have their estates by the act of the parties themselves, whose business it was to take care to provide specially against waste; but tenant by the curtesy and tenant in dower had their estates by the operation of the law, and not by the act of the parties; and, therefore, the law supplied the provision against waste in those cases, in favour of the reversioner, which is in conformity to that ancient maxim *lex nemini facit injuriam.* Another sense again, in which we sometimes speak of the common law, is, in contradistinction to the canon or civil law; as when the question is, whether any matter shall be tried or determined according to the course of the common law, or by the rules of the ecclesiastical or civil-law courts. And sometimes, again, we intend by it, the jurisdiction of the king's courts in contradistinction to the base or customary courts of courts-baron, county-courts, pie-powder, &c.; as when a plea of land is removed out of ancient demesne, because the land is freehold, and therefore pleadable at the common law, that is, in the king's courts of K. B. and C. B. and not in ancient demesne, or in any base court;

principal attention to that most instructive and most useful part of the history of our own country which relates to the progress of improvement in the civil state.

Institutions which originated in the necessities of our ancestors, must be necessarily traced back to the same ancient source for their construction. The only sure guide that can be had in the investigation of the theory of their principles, is the knowledge of the circumstances to which they were accommodated, of the occasional or local demand for them, of the original mischief to be provided against, or the particular inconvenience that was intended to be prevented by them. And although it might seem, perhaps, that every gentleman, or at least every scholar, in the kingdom, should be already acquainted with this branch of instruction, as far as it stands connected with our general history, yet how seldom is it that our general history has been presented to us, in this point of view, as the object of our earlier attention and study.

It demands the exercise of our riper judgment to apprehend through what vicissitudes the prosperity of a state is made to depend upon the wisdom of its legislature; to examine the boundary of those restrictions upon natural liberty, which are necessary to be imposed for the common good; to appreciate the causes of the improved

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but, in the larger and more general acceptation, it implies both the written statutes of the realm, and the unwritten received customs and uses together, the *lex scripta et non scripta.* And it is, therefore, indifferently called common law or common right, *lex communis* or *jus commune*, being common to every man without any particular act or reservation of his own. Co. Litt. 142. a.

condition of the people in the progressive improvement of their municipal institutions and civil usages; and to trace the reverses that lead to anarchy and the dissolution of empire,—to the dereliction of those fundamental maxims of *common equity* and *common right*, which give to society the basis of its political constitution, and dispose it to lasting harmony.

This inseperable affinity between the sources of historical and of legal learning, may be said to constitute one of the brightest images in the theory of professional education; for as, on the one hand, our history throws light upon our laws, so, in proportion to the erudition we acquire as lawyers, we equally ensure our proficiency as historians: they are *sister Sciences*, which go hand in hand together, and mutually elucidate and assist each other (4).

But the still more distinguishing characteristic of professional learning in general, and which at the same time fully evinces how much better adapted it is to the researches of the more enlightened and liberal scholar than to the labours of the plodding copyist, is the inexhaustible variety, together with the fund of materials it affords for the exercise of "intellect," and the application of "the powers of reasoning."

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(4) *Il faut eclaircir l'histoire par les lois*, says Montesquieu, *et les lois par l'histoire. Esprit des Lois, l.* 31. *c.* 2. How many admirable specimens of this kind of judicial illustration of our civil history, are to be found in the innumerable treatises which abound upon every distinct branch of British jurisprudence, and particularly in that first and great work,—"Lord Coke's Commentaries upon Littleton's Tenures."

A man may have as clear, certain, and demonstrative a knowledge of propositions in law, as of propositions in geometry or the mathematics; "for it suffices to the demonstration of any proposition, that the agreement or disagreement of the ideas of which it consists, can be so plainly and clearly perceived, that when it comes to be reflected upon, at any other period, the mind assents to it without doubt, and is certain of the truth of it." In the Essay on the human Understanding, the philosophic writer, having asserted this universal proposition, proceeds to remark, that "a man may be certainly said to know all those truths which are lodged in his memory, by such foregoing, full, and clear perception;" "and thus," he concludes, "the measure of right and wrong is to be made out by necessary consequences, from principles as incontestible as those of the mathematics, to any one who will apply himself with the same indifferency and attention to the one as he does to the other of these sciences."

There is no doubt, that the knowledge of *the theory* of the law must be afterwards perfected by *practice;* for the law is not a speculative but a *practical* science. But, even in this point of view, it becomes us, in the first instance, to apply ourselves to learn *the arguments and the reasons of the law*, in order to be prepared by it to understand the principles upon which practice is grounded. Lord Coke distinctly and repeatedly tells us, that "the law, nay the common law itself, is nothing else but reason;" that "it implies that perfection of reason whereunto a man attains by long study, often conference, long experience, and continual observation;" and, lastly, that "we must, therefore, diligently apply ourselves (avoiding those enemies to learning, the *præpropera praxis et præpostera lectio,)* to a timely and orderly course of reading

that, by searching into the arguments and reasons of the law, we may so bring them home to our natural reason, that we may perfectly understand them as our own[c]." This is in substance the uniform tenor of Lord Coke's advice and injunction to students; and what more useful branch of human instruction is there, or at once more interesting, more edifying, or more delightful to a man of liberal and improved mind, than thus scientifically to investigate the local constitutions of his native land, by deducing them, by necessary consequences, from those incontestible principles of plain reason and common intendment upon which they were originally framed or adopted! *Non enim à Prætoris edicto neque ex duodecim tabulis, sed penitùs ex intimâ philosophiâ hauriendam juris disciplinam puto. Qui alitèr jus tradunt, non tam justitiæ quam litigandi vias tradunt*[d].

But there are some who have imagined a sort of distinction, in the exposition of the theory of the law, between artificial reasoning and that of common sense; as if every proposition which partakes of a more artificial construction, and which consequently requires a more elaborate method of proof in the illustration of it, can therefore no longer be said, with propriety, to be common sense; or, in other words, as if the idea of common sense were in this instance necessarily to be confined to those objects of science alone which are self-evident. The philosophy of the reason, or common sense of the law, for which we are here contending, is not always, (as Lord Coke expresses it,) to be understood of every unlearned man's reason, but of that which is warranted by authority of law[e]; or, as he describes it in another place, it is to be understood

of an artificial perfection of reason, acquired by *long study, observation,* and *experience*[f]; but which, after all, amounts to no more than the same kind of general preparation, which is necessarily required from us in the pursuit of every other equally scientific object or investigation whatever? The advancement of knowledge has this condition inseparably attached to it,—

> "The man who reads, and to his reading brings not
> A spirit and judgment equal or superior,
> Uncertain and unsettled still remains."

Perhaps an example or two may serve to place this matter in a clearer light: "Every proposition is said to be demonstrable in its nature, when the mind can certainly perceive the agreement or disagreement of the ideas of which it consists, whether immediately, as in the case of intuitive perception, or through the medium of those intervening ideas which are called proofs." Now there is, generally speaking, this perceivable agreement or disagreement to be found in all our common-law doctrines; that is to say, so far as they are capable of being put into general propositions, however difficult those propositions may be to the unprepared reader, or how artificial soever in their construction. Let us take, for example, the three following rules or maxims: 1st. "that the father shall not be heir to the son;" 2nd. "that lands descended or devised, shall not be charged with the simple contract debts of the ancestor or devisor, although the money may have been laid out in the purchase (5) of those

f Co. Litt. 97. b.

(5) With the exception of traders within the bankrupt laws, since the stat. 47 Geo. 3. s. 2. c. 84.

very lands;" and 3d, "that lands shall rather descend to a remote relation of the whole blood, or even escheat to the lord, in preference to the owner's half brother." We have here then, three distinct propositions, in which, upon the first view of them, there is nothing like plain reason and common sense to be discovered, without the help of those intervening ideas from which we learn, first, that, under the feudal system, (as it formerly subsisted in this kingdom, till about the middle of the 17th century,) there were certain personal military services to be performed, as the price or condition upon which all lands were held, and to which, therefore, the father, from his more advanced age, was reasonably supposed to be less competent; and, secondly, that it was equally matter of policy, during the same period, that the freeholder, by whom the feudal services were to be performed, should not be distracted, by civil suits, from the discharge of so important a duty; and, thirdly, that the right of succession of the whole blood was only admitted upon questions of adjudication of title, as a mere *rule of evidence* to supply the frequent impossibility of proving a descent from the first purchaser, without which (according to a fundamental maxim of our law) no inheritance was ever allowed, and, consequently, that this was an indulgence to which the demi-kindred could have no reasonable pretension; the descendants of one ancestor being much less likely to be in the direct line of the purchasing ancestor, than those who are descended from the same couple of ancestors.

And what, then, do I mean to conclude from hence? I answer, that the occasion of the difficulty (if any) which occurs in the foregoing propositions, arises from a want of due knowledge in ourselves, of the extent to which the principles of the feudal polity have been engrafted

into our established system of remedial jurisprudence, and the consequent distinction which the common law has taken between *feudal* and *commercial*, with respect to the descent or alienation of real or landed property (6).

From the period of the establishment of the feudal polity in England, in the reign of William the Norman, there seems to have been kept up a sort of constant struggle between the spirit of *commercialism*, on the one hand, and that of *feudality* on the other; and the consequent operation of these two grand principles is to be traced in every part of our law of landed property. The construction of testamentary alienation, for example, was originally adopted upon a purely commercial principle, and in relaxation of the rigour of the feudal system, which had a direct tendency to take lands out of commerce, and to render them inalienable. But here, again, the operation of a feudal principle interferes, and requires a seisin in the devisor, analogous to that of the feoffor or grantor in the case of alienation by deed; so that, by the law of England, a will or devise of lands does not operate by way of appointment of an heir generally, as in the Roman law, but by way of legal conveyance of the lands themselves; and, consequently, cannot operate on any freehold lands, of which, at the time of making the will, the party had not this species of seisin. It is the same in the proposition, secondly above mentioned, respecting the heir; when lands were allowed to be freely aliened, for the sake of commerce, (for which property is chiefly valuable,) it seemed to follow, as a necessary conse-

(6) See the Appendix, prop. 1.

quence, that they should also be attached for the debts and other incumbrances of the ancestor, upon the same principle; but here, again, the operation of the feudal law interfered, and, upon the principle "that the heir claimed nothing from the ancestor, but came in under the original feudal grant," it was held that he should not be *generally* liable, like the executor, to the ancestor's debts of every kind, but only to debts of record, and debts by specialty, in which the heir was named; and the same distinction continues, under certain qualifications, to prevail even to this day. And so in the two other examples which have been mentioned. The feud was made "generally" heritable *in relaxation* of the rigour of the feudal system; but the restriction that the father should not succeed otherwise than collaterally, and the total exclusion of the half-blood, were the consequences of *purely feudal principles.*

If it is necessary that this *demonstrable quality of the doctrines of our common law* should be elucidated by any further examples, I would ask, upon what principle is it,—that a release, which is a discharge of a bond before the day of payment, is no discharge of a rent[g]?—That a lease to commence at any after-period, if made for years, shall be good, but if made for life shall be void[h]?—That the enlargement of a rent by release or confirmation, is to be understood only of rents in esse, and not of newly created rents[i]?—Or, lastly, that a condition, "that if the donee die without issue, the donor and his heirs may enter," shall be void and of no effect; but if the condition be, "that if the donee discontinue and die without issue," that then the donor and his heirs may

g Co. Litt. 292. b.
h Co. Litt. 46. b.
i Co. Litt. 308. a. b.

enter," this shall be a good condition and binding upon the parties[k]?

In the first place, let us take the release, which is a discharge of a bond, but not of a rent, before the day of payment; and yet the obligee can no more bring an action for the debt on bond, than the lessor can for the recovery of the rent, before the day of payment; and, consequently, there is an apparent difficulty in this instance, which is not to be cleared up but by explanation, and the help of reasoning discussion. As for example: a bond imports an actual or present debt; in the language of the law, it is *debitum in præsenti quamvis solvendum in futuro.* There is here then a right, although a dormant or suspended right in the obligee to a thing certain, and of which his release is, therefore, a sufficient discharge. And so it is in all similar cases; as in that, for instance, of the release of an action by an executor before probate, which is a good release; and yet, before probate, the executor can bring no action. But otherwise it is in the case of a rent. Why? Because a rent, before the day of payment, is only a debt accruing, and not a debt accrued. There is here no dormant or suspended right of action in the lessor to a thing certain, but, on the contrary, the thing itself is uncertain, future, and contingent. For, since the rent is to be paid out of the profits of the land, if the tenant be evicted before the day of payment, the rent will be avoided altogether. It is clear, then, that a release of all actions can be of no effect to extinguish a rent before the day of payment; because, at the time of the release, the consideration for which the rent was to be given, viz. the future enjoyment of the land, was not

k Co. Litt. 224. b.

executed (7). And so it is in the case of a breach of covenant, upon the same principle. The covenantee may release all actions, &c. without discharging the covenant. And so, again, in the case of an annuity (8).

The second proposition turns upon the distinction,

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(7) The rent which is here spoken of, is a reserved rent, or rent incident to the reversion; for where a rent does not attend the reversion, but is in gross, a release in that case does discharge all future payments, because the rent is due only by *the contract*.

(8) Co. Litt. 292. b. The distinction which is here taken, is between *a future right*, and *a right to take effect in future*; the latter of which may be released, &c. but not the former. As where there were father and son, and in the lifetime of the father who was disseised, the son made a release to the disseisor of all his right, &c. and afterwards the father died. Upon the death of the father, it was lawful for the son to enter against his own release; because, at the time of the release made, he had no right in the land, but the right descended to him at an after-period, by the death of the father. (Litt. sect. 446.) So, again, in the case Lord Coke puts of the plaintiff in an action of debt before judgment, releasing all demands to the bail: he is not barred afterwards, upon judgment being given, from taking out execution against the bail; because at the time of the release he had but a *possibility*, and neither *jus in re* nor *jus ad rem*. The duty commences upon an after-consideration, and therefore cannot be released beforehand. (Co. Litt. 265. b.) But where the husband made a lease for life and died, and afterwards the wife released to him in the reversion, this was a good release of her right of dower, although she had no cause of action against him, *in præsenti*, (Co. Litt. 265. a.) but only a suspended right of action until he entered and became tenant of the land. Co. Litt. 34. b.

which has been already noticed, between the *feudal* and *commercial* nature of real or landed property (9). Under the feudal system, the proper feudatory or freeholder had always his estate for life, at least, and was regularly invested with it by the public and solemn act of *livery of seisin*, for notoriety-sake; as well that the rightful claimant might know against whom to bring his action, in the case of a disputed title, as also that the lord might run no risk of being defrauded of his feudal fines and services. It became then impossible, from the very nature and constitution of these estates of freehold, at the common law, that they should be allowed to take effect at any after-period; for that would be to suppose a man to retain the possession in himself, after having delivered that same possession to another; *quod esset absurdum.* But on the other hand, the ceremony of investiture, by *livery of seisin*, was held to be unnecessary, under the feudal system, to the creation of estates *for years;* for the tenant for years, or, as he is sometimes called, the termor or tenant of the term, was considered as no other than the bailiff or *locum tenens* of the freeholder; and, therefore, estates for years being suffered to enure as matters of mere contract, there could be no objection to their taking effect either *immediately* or *at any after-period*, as might happen to be agreed upon between the parties.

Thirdly, let us suppose A. having a rent-charge in fee out of B.'s lands, grants it to C. for a year; he may afterwards enlarge it, by release or confirmation, to C. for any number of years, or for life, or otherwise. For every

(9) Vide ante, page 21.

subsequent augmentation which is so made of C.'s estate in the rent, is derived out of the reversion which is in the grantor of that same rent. But, if A. grants a rent-charge to C. out of his own land, there is evidently no remainder over, or reversion of this rent, out of which any further augmentation can be derived. In the former case, there was a rent *in esse*, the reversion of which was in the grantor; but, in the latter, the grant from A. to C. was not of a part of what A. himself had, but of a newly created rent; and, consequently, though A. by a new deed of grant may create a new rent-charge, to take effect upon the surrender or determination of the old, yet of the old rent-charge he can make no further enlargement. For out of what is he to enlarge it? There is no reversion or remainder over, upon which a release or confirmation can operate *pro incremento*.

Lastly, suppose an estate-tail to be created with a condition, that if the donee die without issue, the donor and his heirs may enter; the condition is void. Why? Because the donor in such case might have entered at any rate; and words which provide for no more than must necessarily take place without their intervention, are nugatory and of no effect. Hence the legal maxim, *expressio eorum quæ tacitè insunt nihil operatur*. "And, therefore," says Lord Coke, "the widow whom it was intended to defraud by these words, shall have her dower[1]." But where the condition was, that if the donee discontinued, and died without issue, the donor and his heirs might enter, the condition was good in law, because the donor in that case could not have entered otherwise than by force of the condition, but would have been driven to

[1] Co. Litt. 224. b.

the expensive and dilatory process of a *formedon in the reverter* (10).

Having thus exemplified that the theory of our common-law learning is capable of demonstration and knowledge, (and of which there will necessarily occur many further specimens in the sequel of this inquiry,) it becomes us, in the next place, to consider to what course of reading we ought to apply ourselves, or what system of education to follow, in order to be duly instructed in it. It is, confessedly, of the greatest importance, that the law-student should be well versed in classical learning, and especially in logic; as appears from the very nature of the sources from which the arguments and proofs of the common law are principally drawn, and which, for the satisfaction of the reader, I will endeavour briefly to recapitulate in another place(11). But, how humiliating must it be to a man, who has been thus liberally educated, according to the usage of our Universities, to have to sit down afterwards, for two or three years, at the desk in an office, to copy precedents, in subservience (as Blackstone calls it) to attornies and special pleaders[m]! Or, supposing the drudgery of the thing to be left quite out of the question, I would ask what in the name of fortune is he likely to gain by it? The knowledge of the minutiæ of practice?—It

m Bl. C. Introd. p. 32.

(10) The expense and delay attending a *formedon*, frequently prevented a tenant in tail from resorting to it to assert his right. In the course of time the period for asserting it elapsed; and thus the discontinuance virtually proved a bar to the entail.

(11) See the Appendix, prop. 2.

may be so; but these are secondary considerations, and of no further use or consequence, even to the student who intends to follow the law as a profession, than so far only as they have their foundation in particular principles or rules of law, which demand from us the application of an intelligent mind, and not the labour of our hands in copying precedents. Neither will he have the consolation, in the mean time, of becoming even a tolerable pleader. For pleading too is matter of science and of liberal study, and, like the law itself, (of which it has not unaptly been called the handmaid,) is demonstrable, through all its branches, by the same unsophisticated conclusions of plain reason and common intendment (12).

I appeal to the gentlemen who have undergone the unscientific drudgery, or may happen to be at present doomed to it, that I state the matter of fact fairly;—that the order of the day is, "to copy precedents, and *only* to copy precedents;" for as to the explanation of the proper points and arguments of those precedents, this is constantly the *Italiam fugientem*,—the land of promise at which there is no arriving. If the student can confidently hope for any thing under the alleged system of ordinary tuition, it is to become acquainted, in time, with what is called *the mesne process* of a suit; and if he could also see *issues*, as they are afterwards entered upon *the record*, in what is called *the postea*, so as to inspect and compare the whole together, it might be of some service to him; but even this inconsiderable advantage, (for there is a great deal more to be learned from Boote's History of a Suit,) is not often to be

(12) See the Appendix, prop. 3.

met with in any one office, however distinguished the practitioner. It is but the *detached declaration*, or the *detached plea*, or the like, of which there is usually any question, and these unconnected and unexplained parts of the same suit, are the business of different terms, if not of different offices; so that the student makes about the same progress, whether he sits down to copy a precedent in pleading, or (as some have been known to do) the everlasting folios of *the income-tax act*, or the farraginous *land-tax redemption bill*. Was there ever a more pleasant commentary upon the chapter in Rabelais, "*How Gargantua did amuse himself in rainy weather!*"

For my own part, I do but speak from the experience of the embarrassments with which I have had myself to struggle, in common with every unassisted beginner, in this course of study, and without the most distant intention to throw out any reflection against individuals:—

> Suspicione si quis errabit suâ,
> Et capiet ad se quod erit commune omnium,
> Stultè nudabit animi conscientiam.
> Huic excusatum me velim nihilominùs;
> Neque enim notare singulos mens est mihi,
> Verùm ipsam vitam et mores hominum ostendere.

With this apology, I shall now leave the copying system to its admirers; and proceed to the other principal object in the prevailing scheme of preparatory law-education,—that of reading and common-placing Blackstone's Commentaries.

It is often of much more real disservice to an author, to ascribe to him a degree of merit to which he has no

pretensions, than it is to take from him the merit which he really has: he is consequently exposed by it to the odium of disapproving criticism; his mistakes become matter of importance, his inaccuracies no longer venial, and a degree of responsibility is forced upon him, which is generally injurious to his reputation, in proportion as it is beyond the scope of his engagements. Perhaps, there is no professional writer who has suffered more in this instance, from the zeal of injudicious admirers, than Blackstone, in his celebrated Commentaries. In the rank of elementary composition, there can hardly, indeed, be too much praise bestowed upon them, for the acknowledged neatness, and apparent propriety of their arrangement, the classic purity of their language, and, above all, the elegant, though incomplete and often incorrect perspective they exhibit of the infinitely disjointed and shapeless materials of professional learning, reduced into much seeming order and regularity. But it is not as the elementary composition, that we have now to speak of them;—it is as the institute for educating and forming lawyers. And here, I trust, it will be understood, that whatever license I may permit myself, in the course of the following observations, it will be always without the smallest idea of breaking in upon the respect which is due to the memory of the learned judge, or of detracting, in the slightest degree, from the well-earned general reputation of his truly classical Commentaries. It is only their particular merit, with reference to the misapplication which has been since made of them, that I conceive to be questionable. The error was in adopting them as an institute for the instruction and education of professional students, which was evidently no part of Blackstone's plan, nor within the scope of his engagements. *Non hæc in fœdera venit.* It was not the lecturer

at one of our inns of court, but the university professor, who instructed from the Vinerian chair, and who accordingly addresses himself not to professional but to unprofessional readers. He considers as a popular writer, not what "the few" require to be informed of, but "the many;" and hence too, as a popular writer, and indeed as he himself tells us, he takes care to illustrate those detached parts of the law alone which are found to be most capable of historical or critical ornament[n].

From what is to be collected from the author's own words, it appears that his Commentaries were written in order to be delivered in a course of academical lectures, not to the students of the Inns of Court, but to those of the University of Oxford; and not to instruct and form lawyers, but to render the law intelligible to the uninformed minds of beginners, whom we are apt to suppose acquainted with terms and ideas they have never had an opportunity to learn; and, more particularly, to give a general idea of the law to those gentlemen who might be afterwards called upon to act as magistrates or members of parliament. Addressing himself to persons of this description, like some experienced Actor who accommodates himself to the temper and character of his audience, he represents every thing rather for effect than with a view to demonstrate. Like the gnomon upon the sun-dial, he takes no account of any hours but the serene;—

——————— Et quæ
Desperat tractata nitescere posse, relinquit.

In a professional point of view, this solicitude, rather

n Bl. Comm. Introd. p. 34.

to captivate the imagination of the student than to exercise and discipline his understanding, is equally unprofitable and inconvenient. It puts him off with ornamental illustration instead of solid argument, and leads to a sort of half information, which is often much worse than no information at all upon the subject. A man may read Blackstone's Commentaries, from the one end to the other, and yet have no notion, that a proposition in law is as capable of being resolved and demonstrated as a proposition in the mathematics; the theorem, that "*by the extinction of the fee of a seigniory, a particular estate for life in that seigniory is also extinguished,*" as the theorem, that "*the square of the subtending side is equal to the two squares of the containing sides of a right-angled triangle* (13)."

There is, however, this difference to be observed between the two sciences *of law* and *of mathematics*, that in the latter, in which the reasoning is always upon lines and angles, which are self-evident, we reason from the cause to the effect; while the propositions themselves are of a nature to succeed each other, so that the preceding are regularly the key or clue to those which follow. In the law, on the contrary, the order of our reasoning is usually the reverse of this. We reason from the effect to the cause; and, far from having the traces of their connection before us, as in a series of mathematical investigation, we have necessarily to deduce each required principle, or point of law, from materials of information dispersed through the whole circle of the science, and, not unfrequently, to supply the intermediate links of a long

(13) See the Appendix, prop. 4.

chain of implied reasoning, in order to prove that their application is legitimate.

But to return; since the question is now of Blackstone's Commentaries, considered not merely as an elementary treatise, in which inaccuracies would be venial, and professional misconclusions of no serious consequence, but in the widely different, and far more important character, of an institute for educating and forming lawyers; I object, in the first place, to those half-explained metaphysical distinctions, contained in his introductory chapter, *upon the nature of laws in general.* He tells us, that "the law of nature is the will of the Supreme Being, founded in the relations of justice, that existed, in the nature of things, antecedent to any positive precept; and, being coeval with mankind, and dictated by God himself, that this is of course superior in obligation to any other." Secondly, that "the precepts of the revealed law, are of the same original with those of the law of nature, and their intrinsic obligation of equal strength and perpetuity." And, thirdly, that "the revealed law is of infinitely more authenticity than that moral system which is framed by ethical writers, and denominated the natural law; because, the one is the law of nature, expressly declared to be so by God himself, the other, is only what, by the assistance of human reason, we imagine to be that law; and, since we are not as certain of the latter as of the former, that they are, therefore, not of equal authenticity, nor to be put in competition together."[o]

Now, by the law of nature, (which is described as being coeval with mankind and dictated by God himself,)

[o] Bl. Comms. Introd. p 39, 42.

I understand the *lex non scripta*, or unwritten law, which was given of God to Adam, and from him derived, by tradition, to the people of God till the time of Moses[p]. Secondly, by what is here called the natural law, I understand the common rules of moral action, which are consonant to every man's natural reason; or, in the words of Grotius, the *mores communes naturali rationi consentanei*. And, thirdly, by the revealed law, I understand the law of the holy Scriptures, which has been given us for our special guide and direction, and, from which I conclude, that we have now no longer any occasion to be referred back either to the law of nature or to the natural law; for these, as a rule of conscience, are now no longer of any authenticity at all[q].

The philosophy of right and wrong is a plain doctrine, and stands in no need of being vindicated by the subtilising refinements of casuistical distinction. On the contrary, to endeavour to subtilise in matters of speculative morality, so far from being the way to settle the student's mind, will be much more likely to lead him into endless perplexities and contradictions. Of this the learned Commentator himself affords more than one example, when he afterwards concludes, as a necessary deduction from his own principles, that "the right of property owes its origin, not to the law of nature, but merely to civil society[r];" that "conscience is no further concerned in the violation of property, than by directing a submission to certain penalties[s];" and again, as if there were no moral turpitude in dishonesty, "that for-

p See John 1. 17. and Rom. 5. 13.
q See Doctor Leland's Advantage and Necessity of the Christian Revelation.
r Bl. Comms. 2. 11.
s Bl. Comms. 1. 58.

gery, and even theft itself, are not offences against natural rights[t]."

On the other hand, the propriety of establishing the intrinsic authority of laws of human institution, by appeals to the principles of our religion, has been forcibly pointed out by many writers, and particularly by Grotius in his little treatise (of which it forms the most excellent part) *de jure belli et pacis.* They are the precepts of the Gospel that inculcate the first fixed notions we require, whether of justice or of property. "*Relligioni propria est justitia; et sublatâ pietate fides etiam, et societas humani generis, et una excellentissima virtus justitia tollitur.*"

In the observations that next engage our attention, concerning the nature of society and civil government, society is said to be founded in an original implied contract, "that the whole should protect all its parts, and that every part should pay obedience to the will of the whole;" and wisdom and goodness and power are described to be the three grand requisites that constitute the natural foundations of sovereignty[u].

It was formerly no unfashionable hypothesis, that society had its origin in contract[w]; and so, perhaps, it might still have been, if, in the violence of party-controversy, it had not been undesignedly exposed, by later writers, in all its extravagance and absurdity[x]. It is true, as a general principle, that a man may contract for the benefit of his posterity; but in that case it must equally be admitted, as a general principle, that his posterity will have a right to judge for themselves, whether they

t Bl. Comms. 4. 9.
u Bl. Comms. 1. 47, 48.
w See Locke on Government.
x See Mr. Burke's Appeal from the New to the Old Whigs, p. 119.

choose to take under the contract or not. A compulsory contract is a contradiction in terms; and as to his three grand requisites, "wisdom," "goodness," and "power," these are rather the attributes than the foundations of sovereignty. It suffices, for our present purpose, that society had its origin in reciprocity of interest, and is founded in the acquiescence of all its members, tacit or expressed, in the principle of expediency and public good, by which those reciprocal interests are at once perpetuated and provided for. It is the same principle, the principle of expediency, subject to the control of moral right, and directed to the general aim of the protection and security of all, that constitutes the natural foundation of "lawful" sovereignty; for this is not property, but magistracy.

In the number of objectionable passages which seem to fall under the same general observation, we may also remark the unphilosophical *decantatum* in the fourth volume, upon the imaginary offences of witchcraft, conjuration, enchantment, and sorcery. There is not a more humiliating example to be found of the dominion of prejudice and superstition over weak minds, than the history of the impostures which have, in all ages, been practised upon the ignorant and credulous multitude, under the name of sorcery and witchcraft. For, in regard to our own belief on the subject, we may fairly indulge the liberal hope that our private reason has kept pace with the public wisdom of our legislature, which has long ago proscribed the delusion of these ideal crimes. But let us now hear what Blackstone says, I repeat his own words: "To deny the *possibility*, nay, *actual existence* of *witchcraft* and *sorcery*, is at once flatly to *contradict the revealed word of God*, in various passages both of the Old and New Testament; and the thing itself *is a truth* to which

every nation in the world hath, in its turn, borne testimony, either by examples, seemingly well attested, or by prohibitory laws, which at least suppose the possibility of a commerce with evil spirits[y]."

There is, indeed, no doubt that this odious and cruel prejudice has reigned in every climate of the globe, and adhered to every system of religious opinions; but that, therefore, *the thing itself is a truth*, is what the logicians call a *non sequitur;* and as to the quotation from the Jewish law, (thou shalt not suffer a witch to live,) it proves no more than the statute 33 H. 8. c. 8. which was dictated in the same spirit, and enacts, that witchcraft and sorcery shall be felony without benefit of clergy[z]. All that can be fairly concluded from it is, that the Jews admitted, with equal credulity and abhorrence, "the reality of that infernal art, which was able, as they imagined, to control the eternal order of the planets, and the voluntary operations of the human mind. They dreaded the mysterious power of spells and incantations, of potent herbs, and execrable rites; which could extinguish or recal life, inflame the passions of the soul, blast the works of creation, and extort from the reluctant dæmons the secrets of futurity. They believed, with the wildest inconsistency, that this preternatural dominion of the air, of earth, and of hell, was exercised from the vilest motives of malice or gain, by some wrinkled hags, or itinerant sorcerers, who passed their obscure lives in poverty and contempt." The authority of the civil law (which is said to have punished with death, not only the sorcerers themselves, but also those who consulted them) extends but to the same conclusion, and nothing more. It only proves that the nations and the sects of the Roman world were under the domi-

y Bl. Comms. 4. 60.

z Bl. Comms. 4. 61.

nion of the same blind and barbarous delusion, were the dupes of the same odious and cruel prejudice, without at all proving the actual existence, no, nor even the possibility of the supposed offences. One might just as well assert that there were wizards and sorcerers in England, as far down as the ninth of George the second, because, forsooth, the law against witchcraft and sorcery remained till that period upon our statute book, a disgrace to our penal code (14).

It is not, however, upon the ground of objections like these, that I presume to contend against the propriety of commencing the study of the law by reading and common-placing Blackstone's Commentaries. A distinction may be fairly taken between the introductory matter, which is but inducement to the proposed course of study, and that which is properly the substance of it. But if the substance itself is infected with the same discolourings, if the manner of instruction is superficial, and the materials defective, if conclusions of science are often misconceived, and points of practice mistaken or

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(14) Galileo was charged with heresy before the Holy Office at Rome, in 1615, for having ventured to assert the truth of the Copernican system, which was, that the sun was the centre of the universe, and was immoveable, and that the earth moved not only round the sun, but also round its own axis. The Jesuits cried out that this doctrine was absurd, heretical, and (in the words of the text) *was flatly to contradict the revealed word of God as contained in various passages both of the Old and New Testament*, and thereupon Galileo was condemned. But, like the Areopagus after having condemned Socrates, the Inquisition became, from that period, an object of detestation and ridicule through all the civilized world.

misrepresented, these are strong arguments, (and I rely upon the subjoined examples for the proof of what I advance,) that this is no institute for educating and forming lawyers! I must solicit the patience of my readers, if I expose these details of legal investigation with somewhat more than unprofessional minuteness. Assertions against public opinion require to be maturely weighed, and ought to be well supported. That I may not, however, make this a more tedious task than is necessary, I will endeavour to confine myself to those examples alone, which are the most easy to be understood, and to be as brief as the nature of the subject will allow in the consideration of them. The argument may be dull, but the discussion is interesting.

Let us take, for example, the explanation which is given in Blackstone, of releases. Releases are defined to be a species of conveyance which may enure either, 1st. *per elargir le estate*, as from the remainder-man or reversioner to the particular tenant; or, 2ndly. *per mitter le estate*, as between coparceners or joint-tenants; or, 3dly. *per mitter le droit*, as from disseisee to disseisor; or, 4thly. *per extinguisher le droit*, as from disseisee to the lessee of disseisor; or, 5thly. by way of *entry and feoffment*, as from disseisee to one of two disseisors[a].

Now, I have three principal objections to make to this explanation of releases. The first is, that it does not point out the proper distinction between a release *per mitter le droit*, and a release *per extinguisher le droit*; viz. that in the former case the releasee can, but in the latter that he cannot, hold out every other. For example, a release *per mitter le droit*, is where the releasee can hold

[a] Bl. Comms. 2. 324.

out every other. The release of the disseisee to the disseisor is of this description. And so it is if A., disseised by B. and C., releases to B. For B. shall now hold out C. in the same manner as if A. had regularly entered upon B. and C. as he might have lawfully done, and then made a separate feoffment to B. But if A. is disseised by B. who infeoffs C. and D., and afterwards A. releases to one of them, this is a release *per extinguisher le droit* of A. for the benefit of the two feoffees equally; for the one to whom the release is made cannot hold out the other (15).

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(15) The different operation of a release when made to one of two disseisors, and to one of two feoffees of a disseisor, is to be explained by the distinction which the law takes between a defective title and no title at all. For when the party has a defective title, (not having the possession by his own wrong,) the law protects him in the possession until he is lawfully evicted by the rightful claimant. But with respect to those who have no title at all, it is otherwise. Thus, if A. is disseised by B. and C. the disseisors have only a naked possession, unaccompanied with even the shadow of the right of possession; and, consequently, if A. releases to one of them, it operates as a feoffment to the releasee, precisely in the same manner as if A. had actually revested his former estate by his entry, and then granted, with livery of seisin, to the releasee. See Co. Litt. 276. b. and note 240. But where there are joint feoffees, and the disseisee releases to one of them, it operates for the benefit of each feoffee indifferently, because the feoffees have colour of title. Co. Litt. 194. b. 275. a. and note 239. For, originally, no tenant could make a feoffment without the lord's licence, and when the lord consented to the alienation, the only form of conveyance was by livery of seisin, which was a public act, and to which the ceremonies of homage and fealty were also necessary. There was, consequently, in this case, a colourable title or presumption of right, but in the other case there was no pretence of any right or title at all. Co. Litt. 264. a. and note 208.

Upon the same principle, if the disseisee releases to the lessee of the disseisor, this also is a release *per extinguisher le droit* of the disseisee, and of which the reversioner, as well as the lessee, shall have advantage. For they have both of them but one estate in law, and, therefore, the confirmation of the particular estate is equally the confirmation of the reversion. And so it is if a patron is usurped upon by two, and afterwards releases to one of them. It operates, by way of extinguishment, for the benefit of both equally; because the admission and institution are *quasi* a legal adjudication of the title (16).

Secondly, I apprehend that the releases which are here described, (no. 3,) *per mitter le droit*, and (no. 5,) by way of entry and feoffment, are not exactly different species of releases, but only one and the same species, differing no

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(16) There is a further distinction to be taken between the operation of releases *per mitter and vester le droit*, and those *per extinguisher le droit;* viz. that in the former case the releasor is supposed to have a right of entry, and in the latter not. To this rule, however, there are some exceptions. For example, A. was disseised by B., an infant, who made a feoffment to C. and afterwards C. died seised, and the land descended to his heir, D., B. being still an infant. Now, in this case, A.'s entry was taken away by the descent; but B., the infant, might either enter, or have a writ of *dum fuit infrâ ætatem*, or a writ of right. In the mean time, if D. obtains a release from A., and afterwards B. brings a writ of right, he shall be barred by the release from A. to D. For in a writ of right, the question is of the mere right, and the words *modo et formâ prout* are words of form only, and not of substance. And thus the original disseisee, having more mere right than the demandant, may grant a release which shall enure *per mitter and vester* that right in the releasee, notwithstanding he has no longer a right of entry. Co. Litt. 278. b.

otherwise than in circumstance. For every release which operates by way of entry and feoffment is in fact a release *per mitter le droit;* and if the disseisee releases, whether to one disseisor alone, or to one of two disseisors, it operates equally, in both cases, *per mitter and vester le droit of the disseisee*, and *by way of entry and feoffment;* that is to say, the releasee has the same title in both cases as if the disseisee had actually revested his former estate by his entry, and afterwards made a feoffment with livery of seisin to the releasee, and *he shall now hold out every other.* And, thirdly, I object that there is another distinct species of release of which no notice whatever is here taken; namely, a release *per extinguisher le estate;* as from the grantee of a rent charge to the owner of the land, or a release of the services from the lord to the tenant, or a release of common of pasture, &c.[b] If the lord sells the freehold of the inheritance of the copyhold to another, and afterwards the copyholder releases to the purchaser, this also is a release *per extinguisher le estate,* and the copyhold interest becomes extinct[c].

[c] The release of a title, as used in contradistinction to a *droit*, has also its peculiar operation; for this enures only by way of extinguishment. Suppose, for instance, A. infeoffs B. upon condition, and afterwards the condition is broken, and afterwards B. is disseised by C., and afterwards A. releases to C. A.'s release shall enure by way of extinguishment; so that if afterwards B. enters upon C., as he may lawfully do, he shall hold the land discharged of the condition[d]. But supposing a *droit* to have been released, under the same circumstances, it would have enured for the reasons already mentioned; not *per*

b Co. Litt. 280. a. 307. b.
c 1 Leon, 102. Wakeford's case.
d Co. Litt. 277. b.

extinguisher, but *per mitter and vester*, or, which has been shewn to be in effect the same thing, by way of *entry and feoffment*. And as of a title of entry for condition broken, so it is of all other titles, by escheat, by forfeiture, &c. (17).

I have ventured to offer these few remarks, upon the nature of the operation of releases, by way of specimen of the sort of loose, inaccurate, superficial kind of professional instruction, which is to be picked up from Blackstone's Commentaries. The apparent propriety with which he distinctly enumerates the five several species of releases, leaves us no room to suspect that any thing material has been omitted. And yet, when we come to make the application of what we know upon the subject, we find our ideas unsettled, our information incomplete

(17) There is a distinction, in law, between a right and a title properly so called: for, in the first place, rights are indifferently by descent or purchase; but titles, on the contrary, though subsequently completed by the entry or other act of the party, are always vested, in the first instance, by act and operation of law. Of this kind is a title of dower, title of entry for condition broken, title by escheat, by mortmain, and so forth. Co. Litt. 215. b. Secondly, a right includes not only a right for which a writ of right will lie, but also any title or claim by force of a condition, mortmain, or the like, for which no action is given by the law, but only an entry. Co. Litt. 265. a. And hence it is said, that every right is a title, but every title is not a right; that is to say, not such a right for which an action will lie. Co. Litt. 345. b. 347. b. Again, in the case of a right, the entry of him that hath the right may be taken away by a descent; but in the case of a title it is otherwise. Co. Litt. 240. b. Another general distinction is, that rights are transferable, whether by release or otherwise; but titles, on the contrary, are not transferable. Co, Litt. 214. a.

and unsatisfactory; and more particularly so, from no notice being taken of the distinction between releases of *estates* and of *droits*; a most important distinction, and which pervades the whole doctrine of the law of releases (18).

There is the same distressing confusion again in the explanation of the different kinds of guardianship[e], and which seems to arise from not distinguishing, with sufficient accuracy, between guardianship by *nature*, which is confined, by the common law, to the heir apparent alone, and continues till he attains the age of twenty-one, and guardianship by *nurture*, which is of all the children equally, and ceases at fourteen, in the case both of males and females[f]. He designates the father, and, *in some cases*, the mother, as the guardians by nature, which is, implicitly, to exclude the other ancestors; whereas, in point of fact, the law makes no such exclusion[g]. Neither, again, is this at all explained by the sentence which follows; "for if an estate be left to an infant, &c." On the contrary, the guardianship by *nature*, being restricted by the common law to the heir apparent alone, and not extending to the other children, the receiving the profits of the estates of the children in general, is, consequently, no part of the office of the guardian by *nature*. Again, it is a very doubtful point with regard to daughters, whether the alleged guardianship is recognised, (as Blackstone says,) by the construction of the statute 4 & 5 Ph. and M.; or whether, on the contrary, the latter is not merely a statutory guar-

e See Bl. Comms. 1. 461.
f Co. Litt. 84. a. b. and see note 66.
g See 3 Co. 38. b.

(18) See the Appendix, prop. 5.

dianship, directed by the legislature in conformity to the dictates of nature, and upon principles of general reasoning[h]. And still more questionable is it, whether the ordinary may appoint, in default of the guardians by *nurture;* or whether, on the contrary, the appointment of the ecclesiastical court is not confined merely to guardians *ad litem*[i].

It is usually understood, I believe, that of the four volumes which form the subject of our present consideration, the second (upon the rights of things) is that in which Blackstone principally excels; not only in the selection and arrangement of his materials, but also in the propriety and perspicuity of his manner of treating them. And yet, with respect to the doctrines which confessedly fall under this division of inquiry, how extremely difficult is it for the student to form to himself a clear and precise notion of those ordinary common-place distinctions between droiturel and tortious conveyances (19), between descendible freehold and fee-simple qualified (20), and between estates limited in contingency by deed and by devise (21). How difficult is it, from what is said in explanation of the nature of our common-law leases, together with their several enlargements and restrictions, to collect even the primary distinctions between void and voidable, for years and for life, and between things in grant and in livery (22). The operation of a fine too, as it dif-

h See the note 66, to Co. Litt. 88. b. i See the note 70, to Co. Litt. 88. b. sect, 3.

(19) See the Appendix, prop. 6.
(20) See the Appendix, prop. 7.
(21) See the Appendix, prop. 8.
(22) See the Appendix, prop. 9.

fers from that of a recovery, (where the tenant in tail has the reversion in himself and there are no intermediate remainders,) is by no means distinctly elucidated (23); nor why a recovery cannot be had of an estate-tail with single voucher, but only with double voucher at least (24.)

In the same manner, again, in distinguishing between contingent remainders and executory devises, he omits to point out that which is the principal and essential difference, namely, that "the former may be barred and destroyed, or prevented from taking effect, by several different means, while an executory devise, on the contrary, cannot be prevented or destroyed, by any alteration whatsoever, in the estate out of which, or after which, it is limited." And upon this ground it is, that executory devises are required to be limited, so as not to exceed the stated time of lives in being and twenty-one years and nine months; but not so contingent remainders, because in the latter case there is no danger of a perpetuity. Indeed, from the very terms in which an executory devise is afterwards exemplified, we are naturally led to confound executory devises with contingent remainders, and contingent remainders with conditional limitations. I allude to the words where a devisor *devises his whole estate in fee, but limits a remainder thereon to commence*, &c.[k]; for, in this case, the entire fee, or whole quantity of the estate, having been originally disposed of, there was evidently no longer any residuary part, or remainder over, for further disposal, but only a secondary

k Bl. Comms. 2. 173.

(23) See the Appendix, prop. 10.

(24) See the Appendix, prop. 11.

or springing use[l]. Wherever a preceding executory limitation carries the whole interest, a subsequent limitation is not to be considered as a limitation upon the preceding, and to take effect after it, but as an alternative substituted in its room, and only to take effect in case the preceding estate should fail, or never take effect at all[m]. It follows, that the subsequent limitation, in the present instance, is no *remainder*, but only a concurrent possibility, which is not barrable by fine or recovery. But, if the subsequent limitation had been after a preceding estate-tail, instead of a preceding fee-simple, it would have been otherwise; for then it would have been rightly named "a remainder."

Secondly, it is the quality of a remainder to wait the expiration of the preceding estate, and then to vest in possession, as the corresponding part or portion of the same fee; but here, on the contrary, the estate which was limited in contingency to B. and his heirs, was limited so as to vest in possession, in extinction, and defeasance of the preceding estate, and consequently is not a remainder(25).

Again, we read that "contingencies and mere possibilities, though they may be released and devised by will, or may pass to the heir or executor, yet cannot (it hath been said) be assigned to a stranger, unless coupled with some present interest[n]."

l Fearne. Cont. Rem. p. 419, last edition.

m Ibid. p. 522.

n B. C. 2. 290.

(25) See the Appendix, prop. 12.

But, independently of thus confounding contingencies and mere possibilities, as if they were in *pari ratione*, which they certainly are not, there is here a great mistake; first, in describing mere possibilities to be such as may be released or devised by will, &c. and, secondly, in supposing devisable possibilities to be incapable of being assigned to a stranger. For, in the first place, there is this wide difference between contingencies (which import a present interest of which the future enjoyment is contingent) and mere possibilities, (which import no such present interest,) namely, that the former may be released in certain cases, and are generally descendible and devisable; but not so the latter. Suppose, for instance, lands are limited (by executory devise) to A. in fee, but if A. should die, before the age of twenty-one, then to C. in fee; this is a kind of possibility or contingency which may be released or devised, or may pass to the heir or executor, because there is a *present interest*, although the enjoyment of it is future and contingent. But, where there is no such present interest, as the hope of succession which the heir has from his ancestor in general, this being but a *mere* or *naked* possibility, cannot be released or devised, &c.[o]

Secondly, contingencies or possibilities, which may be released or devised, &c., are also assignable in equity upon the same principle; for an assignment operates by way of agreement or contract, which the court considers as the engagement of the one, to transfer and make good a right and interest to the other. As where A. possessed of a term of 1000 years, devised it to B., for 50 years, *if she should so long live*, and after her decease to C., and died;

o Fearne, p. 366.

and afterwards C. assigned to D.; now this was a good assignment, although the assignment of a possibility to a stranger [p].

Again, before the statutes 8 Ann, c. 14. and 5 G. 3. c. 17. no action of debt was maintainable for the recovery of a freehold rent till after the lives ended; for which Blackstone assigns the following reason, namely, that "the law would not suffer a real injury to be remedied by an action that was merely personal[q]." But, how comes it then, that the action of debt was maintainable after the lives ended? The determination of the lives could not alter the nature of the injury.

Under the feudal system, all lands, tenements, rents, commons, and hereditaments, in fee simple, fee tail, or for term of life, were held to be feudal property, and were consequently required to be recovered as such by their proper feudal remedies. Our old law books call them, indifferently, feudal or real property, and feudal or real actions; personal actions, which were not introduced till long afterwards, being only recurred to for the recovery of commercial in contradistinction to feudal property, such as matters of mere contract, and things which were suffered to enure as such. It followed, that no action of debt could be brought, at the common law, for the recovery of a freehold rent till after the lives ended, or, in other words, as long as there was a continuing relation of lord and tenant. It was not because of the real nature of the injury, (which necessarily remained the same,) but because of the *feudal quality of the freehold*, or continuing relation of lord and

p The same point was determined in the case of Theobald v Duffay, in the House of Lords, March, 1709, 30.

q Bl. C 3. 232

tenant; but otherwise it was, *after the lives ended*, because the feudal relation was then become extinct; and, therefore, the rent arrear was suffered to enure, as a debt incurred, and to be recovered like any other debt, by a personal action, as a matter of mere contract between the parties (26).

Again, a defeazance of a feoffment, if made subsequently, is void; for which Blackstone assigns this reason, "that no subsequent secret revocation of a solemn conveyance, executed with livery of seisin, was allowed in those days of simplicity and truth[r]." But, according to this mode of reasoning, there should be no after-made defeazance allowed of a recognizance, or of a judgment, or of any other executory conveyance of record, which

r Bl. Comms. 2. 327.

(26) Before the statute 8 Ann. c. 14. if A. had leased to B. for life, reserving a rent, he could not, by the common law, bring an action of debt for *this rent*. Why? because he had an estate of freehold in the rent, viz. during the life of B. and he could not assert his right to the arrears, without asserting his right to the *estate;* and this he could not do in an action of so low a nature as an action of debt. By the same rule, again, if A. had granted a rent seck to B. for life, although, by the common law, B. could not distrain, nor (if he had no seisin) bring an assise, yet the law would rather leave him without remedy than suffer him to assert his right to an estate of freehold in an action of debt. But, upon the death of B. (the grantee,) his executor might recover the arrears by action of debt, *causâ quâ suprà*. And so in the other case, where A. leased to B. for life, A. might recover the arrears, by action of debt, upon the death of B; for, in both these cases, the *estate of freehold* in the rent was determined.

are all equally solemn with a feoffment. Lord Coke expressly tells us, that there can be no after-made defeazance of a feoffment, because it is an *executed* conveyance, in contradistinction to those which are executory[s]. In the case of a feoffment, the estate in the land is finally vested or executed in the feoffee, by the act of livery of seisin, at the instant it is made; and, consequently, the feoffor can no otherwise have the land again, than by a reconveyance *de novo*. *Quod semel factum est, non potest infectum reddi.* But otherwise it is, in the case of statutes, recognizances, obligations, judgments, and the like; for these are but *executory;* that is to say, they remain to be completed by a further act still to be done; viz. the process of execution; and, consequently, till that is had, they may of course be defeated or discharged at any time. And so it is of all other matters which are in their nature executory, such as rents, annuities, conditions, warranties, and so forth (27).

s Co. Litt. 204. a.

(27) Co. Litt. 236. b. The distinction between executory and executed conveyances, is a doctrine of very extensive application, and is highly important to be attended to, in the construction, not only of legal, but also of equitable or trust estates. Thus, in the case of articles, or a will directing a conveyance, &c. the Court of Chancery will order the conveyance to be made in such manner as may best answer the intention of the parties, for these matters are purely executory, in prospect of the assurances to be made afterwards, and because the completion of them is referred to a *future conveyance* or *settlement*, in contradistinction to those trusts in which no such executory medium is referred to, and which are, consequently, not equally open to the construction of a court of equity upon the circumstances of intention.

Again, it seems to be rather an indistinct criterion of the locality of action, to refer it to the "plaintiff's suing for damages, &c. affecting land[t]." For, if the lessor brings an action of debt, for rent, or repairs, &c. against the lessee, or the assignee of the lessee, he equally sues for damages, &c. affecting land, and yet they are not equally local actions (28).

Again, in treating of the recovery of heriots, he says, "as for that division of heriots, which is called heriot-service, and is only a species of rent, the lord may distrain for this as well as seise[u]." Now the heriot-service which is reserved by deed, is only a species of rent, and, therefore, the law allows it to be recovered as such, by the usual remedies of distress, or action of debt, or covenant; but it does not follow, that it may be also seised, as a heriot which is due by custom. On the contrary, the heriot-service, which may be either seised or distrained for, at the lord's discretion, is that which is due by ancient tenure, (having been created before the statute of *quia emptores*, and not that which is due, like rent, upon a reservation in a grant or lease, &c. The distinction, in few words, is this: the heriot-service which is due by deed, and which is only a species of rent, lies in *rendre* alone; heriot-custom in *prendre* alone; and heriot-service, which is due "by tenure," in both *rendre* and *prendre*[w].

Quære again, whether, in its present acceptation, the meaning of a "fee-farm rent," is not rather to be referred

t Bl. Comms. 3. 294.
u Bl. Comms. 3. 15.
w See Saunders, 2. part, 1. c. 59.

(28) See the Appendix, prop. 13.

to the *perpetuity* of the rent than to the *quantum*[x]? For is not every rent or service, whatever the *quantum* may be, which has been *reserved* upon a grant in fee, a fee-farm rent[y]?

Quære again, if a rent, or other incorporeal hereditament, is granted *per autre vie*, and the grantee dies in the life-time of the *cestui qui vie*, whether such rent, or the like, will be thereupon determined, as Blackstone apprehends[z]; or whether, on the contrary, since the statutes 29 C. II. c. 3. and 14 G. II. c. 20. it will not be held to continue in the grantee's representatives[a]?

Again, in treating of title by prescription, he says, "a prescription cannot be for a thing that cannot be raised by grant,—as for a toll, for example: for as such claim could never have been good, by any grant, it shall not be good by prescription.[b]" It is generally true, that every prescription presupposes a grant to have existed(29); and, secondly, that a toll upon the public *per se*, could never have been good by any grant; but it does not fol-

x Bl. Comms. 2. 43. and see the etymology of "farm," 2. 318

y See the note 235. to Co. Litt. 144. a.

z Bl. Comms. 2. 260.

a See 3 P. Williams, 264. in the note Barnardist. Rep. in Ch. 46. Kendal v. Micfield.

b Bl. 2. 265.

(29) The doctrine, that prescription presupposes a grant, is not to be understood in a literal sense, but only as a presumption of law; in the same manner as it is said *nonuser* presupposes a release. It is not, that the courts always really believe that such grant, or such release, were ever actually executed; but, for the sake of the general principle of *quieting the possession*, they will not permit it to be disturbed by claims long dormant, and, therefore, determine in the same manner as they would determine if the very instrument of grant or release were produced.

low that it might not have been raised upon some other consideration, which may operate in lieu of a grant, and, consequently, *may be claimed by prescription* (30). Thus, where the soil and the toll have been in the same hands, from before time of memory, it will be presumed that the soil was originally granted to the public in consideration of the toll; and, in that case, the original grant will be held to be a good consideration to support the demand. And so it is in the case of prescription for exclusive common of pasture, for the same reason. The law will not suppose, that, at the original grant of the common, the lord meant to exclude himself[c]; and yet, the freeholders by prescription, and the copyholders by custom, (which in this instance is equivalent to and in lieu of prescription,) may have sole and separate pasture against the lord; for, where such exclusive common has immemorially subsisted, it will be presumed that the lord had originally granted away the seignory to the freeholders, and afterwards resumed it again, by their regrant, divested of the commonage[d].

By the same rule, again, the ownership of the soil does not appear to be essential (as Blackstone states it) to a several fishery[e]; for, there is no inconsistency in supposing the sole right of fishery to have been originally granted with a reservation of the soil; and, consequently, a man may prescribe for a several fishery, against the owner of the soil, upon the same principle that sole and separate pasture may be prescribed for against the lord;

c Co. Litt. 122. b.
d Saunders, 1. 59. Ibid. 2. 5.
e Bl. Comms. 2. 39.

(30) 1 T. Rep. 660. And see Co. Litt. 114. b. where a toll is expressly mentioned among those things, *that may be claimed by prescription.*

indeed, Lord Coke distinctly tells us, they may be in different persons[f]. And, secondly, it may also be doubted, whether Blackstone is quite accurate in defining a free fishery, to be the exclusive right of fishing in a public river[g]; for whether the franchise or liberty to fish, be exclusive or not, and whether the stream be private or public, it seems to be equally, in the language of the law, a free fishery[h].

Again, it is contended that the sole and exclusive property of those animals that come under the denomination of game, has been originally vested in the king, upon the common-law maxim of their being *bona vacantia*, and having no other owner (31). But how does this stand with the admission that every man had, originally, a qualified ownership in all animals *ferœ naturæ*, as a necessary consequence of possession, *ratione soli?* For, originally, there was no distinction between one species of wild animals and another. Or, how comes it that the common law should have, originally, overlooked this qualified ownership in hares and partridges, any more than in squirrels and butterflies? For these are all animals *ferœ naturæ* alike, and the notion of their being *bona vacantia* cannot apply to one species more than to another. With respect to waifs and estrays, and the like, these indeed are *bona vacantia*, for they are things out of possession, and in which *no man claims any property:* and, therefore, the law has attached them to the royal

f Co. Litt. 4. b. and 122. a.
g B C. 2. 39.
h See the authorities cited in the note 181. to Co. Litt. 122. a.

(31) B. C. 2. 415. Mr. Christian, in his notes on B. C. has entered largely into the refutation of this doctrine. My reason for introducing it in the text is, therefore, only to shew how it stands contradicted by Blackstone's own admissions.

prerogative, upon a principal of general policy, for the sake of avoiding the contention of occupancy, and to prevent temptations to committing theft. But, in the present instance, there originally existed a qualified ownership, *ratione soli:* and the supervenient restraints imposed on the exercise of that qualified ownership, have merely arisen from positive laws since made, and subject to the restrictions of which the original qualified ownership still exists[i]; and I, therefore, apprehend the conclusion to be, that this species of property was attached to the royal prerogative in restriction and infringement of the common right, and not as *bona vacantia*, or things in which no man claimed a property.

Again, in distinguishing between the judicial and ministerial capacities of sheriff, he considers it to be in the former of these capacities, and not in the latter, that he (the sheriff) is to decide the election of knights of the shire, and to return such as he shall determine to be duly elected[k].

Now, if a magistrate or other public officer, in the discharge of a *ministerial* duty, mistakes the law, he renders himself personally responsible for all the consequences, and is *liable to an action* in which damages shall be recovered at the suit of the party aggrieved; but otherwise it is if he mistakes the law in a thing within his jurisdiction, acting as judge and not as minister[l]. For example, if my servant is robbed, and a justice refuses to examine him concerning the robbery, by which I am prevented from proceeding against the hundred, I may have an action on the case against him. Why? Because the ex-

i B. C. 2. 403.

k B. C. 1. 343. And see contra, Blackstone's Answer to Sir William Meredith's Pamphlet, 1769. p. 23.

l 1 Hawk. P. C. 192. 2 ibid. 4. and 85.

amination by him in this case is not as judge, but as a particular minister appointed by the act for that purpose[m]. Upon the same principle, if justices of the peace adjudge a child to be a bastard who is not so, an action lies against them. For here, again, they are acting in the discharge of a *ministerial* function, and not as judges[n]. The escheator who returns a false office, contrary to what was found by the jury, is liable to an action upon the case at the suit of the party aggrieved, upon the same principle[o]. And why then is a different conclusion to be drawn with respect to the sheriff acting as the returning officer at the election of knights of the shire? Does he not subject himself to an action by his false return, in the same manner as the escheator does? And why, but because in the eye of the law he is considered like the escheator, to be acting in that capacity, not as judge, but as minister? And if he fails in the performance of his duty, by not making the return in due time, or by returning others than those who are duly elected, he is not only liable to an action in which double damages are given, but incurs the additional penalty, in the former case, of 500*l.* and in the latter of 100*l.*[p]

Again; we read, that "no action will lie for slander or libel where the defendant can prove the facts to be true. As, if I can prove the tradesman a bankrupt, the physician a quack, the lawyer a knave, and the divine a heretic, this will destroy their respective actions. For though there may be damage sufficient accruing from it, yet, if the fact be true, it is *damnum absque injuriâ*, and where there is no injury, the law gives no remedy. *Eum qui nocentem infamat, non est æquum et bonum ob eam rem con-*

m 1 Leon. 323.
n Combub. 482
o 4 Inst. 226. 1 Roll. Abridgm. 92.
p B. C. 1. 180.

demnari; delicta enim nocentium nota esse oportet ut expediat."

That the truth of a libel may be *pleaded specially*, in justification, is said to be warranted by the opinion of the profession, and the practice of the present day; but this is to be understood with certain restrictions; and the defendant cannot, upon the general issue of "not guilty," prove the facts to be true in *justification*, but only in *mitigation of the damages*[q]. On a motion for an information in the Court of King's Bench, for a libel, (Mich. Term, 8 G. II.) Lord Chief Justice Hardwicke expressly declared *that it was a mistake* to suppose that if *an action* were brought, the fact, if true, might be *justified;* that he had never heard of a *justification* in an action for a libel even hinted at; that the law was too careful in discountenancing such practices; and that the only favour which the truth afforded in such case was, that it might be shewn in *mitigation of damages in an action*, and of the fine upon an indictment or information.

I presume then, with submission, that the law is much too generally stated, when it is said, that *no action* will lie if the defendant can prove the facts to be true; but that which I principally object to, in the present instance, is the general tenor of the reasoning from the dictum of the civil law (32).

q B. C. 3. 125. Ibid. 306. Ibid. 4. 123.

r Selwyn's Law of Nisi Prius, p. 935. Buller N. P. p. 9.

(32) Eum qui nocentem infamat, &c. is one of those loose dicta of the civilians, in which there is neither justice nor policy, and which has accordingly been rejected by our neighbours of the Continent, as may be seen by the following extract from the

It is true, that where there is damage without injury, *ubi damnum absque injuriâ*, the law gives no remedy. But then it is to be understood that the act, from which the damage arises, is itself perfectly innocent and lawful. For example, suppose I have a mill, and my neighbour builds a mill upon his own ground, by which the profit of my mill is diminished, yet no action lies against him; for, in building the mill upon his own ground, he does a lawful act[s]. And so if one set up a school in the neighbourhood of an ancient school, by which the ancient school receives damage, yet no action lies; for this is a lawful act, and the public are benefited by the competition in such cases[t]. But, with respect to defamation of character, which is the ground of an action upon the case, for slander or libel, the conclusion is widely dif-

s 1 Roll Abridgm. 107. Noy's Maxims, 84.

t 1 Roll. Abridgm. 107. Noy's Maxims. 84.

Introduction to their new Penal Code. " Depuis longtemps on desirait que le legislateur mît un frein à de tels exces; car ou le fait qu'on s'est permis d' imputer à quelqu'un est defendu par la loi, ou il ne l'est pas. S'il est defendu, c'est aux juges qu'il appartient de verifier le fait et d'appliquer la peine. Tout bon citoyen doit le denoncer, et si au lieu de le declarer à la justice, il le répand dans le public, soit par ses propos, soit par ses écrits, il est evident que cette conduite est dirigée par la mèchanceté plutôt que par l'amour du bien. La maliguite qui saisit avidement ce qu'on lui presente comme ridicule ou odieux, convertit bientôt les allegations en preuves, et bientôt le poison de la calomnie a fait des ravages qui souvent ne s'arrêtent pas à la personne calomniée, mais portent la desolation dans toute la famille. En vain pretendraient-ils que les faits sont notoires; en vain demanderaient-ils qu'on les admette à la preuve; ils ne seraient point écoutés; de pareils débats ne serviraient qu'à donner plus d'éclat à cette publicité même qui constitue le délit. Code Penal, liv. 3. tit. 2. ch. 1.

ferent; for, in order to support the action, the defamation must be shewn to be *from malice*, and unconnected with the ends of public justice, and, consequently, in no point of view can be said to be an innocent and lawful act[u]. On the contrary, the very essence of this offence is the *malus animus*, the malicious and wicked intention to defame and vilify, which is no more capable of being *justified* by the eventual truth of the suggestion, upon the general issue of "not guilty," than the act of wilfully and maliciously killing an attainted or outlawed felon or traitor, is to be justified by the production of the record of his attainder or outlawry[x].

But although it is strictly *no justification* of the defamer, that the alledged matter is true, yet the law having, in this particular, a respect to the weaknesses and frailties of human nature, allows him either to *plead specially some traversable fact*, which, by disproving the *falsity* of the accusation, is tantamount to a *justification*, (and that indeed has only been settled by very late decisions,) or to give evidence to that effect upon the general issue, not in *justification*, but in mitigation of *the damages* to be rendered by way of compensation to the party aggrieved; for it is evident that this must always depend in a great measure upon the relative innocence and credit of him to whom the compensation is to be made. And though, as a general proposition, it is no doubt expedient that offences should be made known, it is not so by means of slander and libel; not by defamatory accusations promulgated in malice, and unconnected with the ends of public justice. *If a person has been guilty of a crime, he ought to be proceeded against in a legal way, and not reflected upon in this manner*[y];—

u 1 Lev. 82. 1 Roll. Abridgm. 58. Finch L. 186.

x 1 Hale. P. C. 497.

y Buller. N. P. 9.

His faults lie open to the laws, let those,
Not you, correct them!

And here, perhaps, I may be allowed to remark, that the maxims borrowed from the Roman or civil law are sometimes very unnecessarily introduced in Blackstone's Commentaries, when the suggestions of plain common sense may serve our purpose a great deal better. Of this description, the foregoing is a remarkable example. Upon another occasion, instead of explaining that the inn-keeper is bound to restitution, if the guest is robbed in his house, by any person whatever, unless by his own servant or companion, because of *the public employment he exercises*[z], he refers us to the vague maxim of *qui non prohibet cum prohibere possit jubet.* And instead of explaining, that the husband and wife are not admitted to be witnesses *for* each other, because it might be a temptation to perjury, nor *against* each other, because it would be against the policy of marriage, he assigns the more remote reasons, concluded, in the first instance, from the maxim, *nemo in propriâ causâ testis esse debet;* and in the second, from the maxim, *nemo tenetur seipsum accusare.* And so in many other instances;—

Transvolat in medio posita, et fugientia captat.

But to return; we read, that "the father may have the benefit of his children's labour while they live with him, and are maintained by him; this being no more than he is entitled to from his apprentices and servants[a]." But surely there is no analogy between the supposed condition of children and that of apprentices and servants; for the

z 1 Ld. Raym. 917. 1 Salk. 143. a Bl Comms 1 453.
12 Mod. 487.

former have a natural, original, indefeasible right to maintenance, which the latter have not. By the very act of begetting them the parents have entered into a voluntary obligation to provide, that the life which has been by them bestowed shall be by them protected and preserved. So far, indeed, does our law carry this principle, that where the expenses of the maintenance of an infant have been afterwards sued for by the parent, to be paid out of the infant's estate upon his coming of age, it has been always disallowed in equity[b].

In the same loose manner of reasoning again, it is said, that "a master may justify an assault in defence of his servant, because he has an interest in his servant, not to be deprived of his service[c]." In the event of the master being deprived of the service of his domestics, the law has provided him a sufficient remedy, by action of trespass upon the case, *per quod servitium amisit.* He originally contracted for the supposed service, upon a pecuniary consideration, and now receives a pecuniary recompense for the loss of it, which is all that can, in reason, be required; for, if men were allowed, under such circumstances, to take the law into their own hands, and to justify assaults in defence of the persons of those in whose services they may have acquired a temporary interest, it is evident that this doctrine might be of dangerous consequence, and lead to endless contention and violence[d]. The reason that the parent is allowed to justify an assault in defence of the persons of his children, is not because he has an interest in their service, (and yet he too may have a *per quod servitium amisit*, which shews that he has an interest,) but because of his natural duty and

b 3 P. Williams, 154. Gilb. Evid. 239. Ves. 675.
c Bl. Comms. 1. 429.
d 1 Salk. 407.

parental affection; and even this the law rather permits than enjoins[e]. How much less, then, will the law justify in a master, an act of violence in defence of a servant, which it only excuses, rather than justifies, even in a parent acting in defence of his children!

Again, it is a mistaken notion, and no part of the law of England, that "a man may acquire a property in the person of his enemy, by taking him a prisoner in war; no, not even till his ransom be paid[f]." There is no doubt that at different periods of our history, not only this but many other equally uncivilized and barbarous doctrines have been held to be part of the common law. Lord Coke tells us, that anciently, if a man was outlawed, (but which he could not be, by the old law, excepting for some capital felony,) he was looked upon as a wild beast, and any one who met him might put him to death; and this (he observes) continued to be the law for some time after the conquest, till the judges, in the beginning of the reign of Edward III. had the humanity to resolve it to be murder[g]. But I presume, with all due submission, that we have no more to do with the doctrines and precedents of those remote times, where they interfere with the interests of humanity, and, as in the present instance, are confessedly against natural reason and justice, than we have to do with the laws of old Rome or of modern Barbary(33). To the proposition which is also laid down as a

e Bl. Comms. 1. 450.
f Bl. Comms. 2. 403.
g Co. Litt. 128. b.

(33) It is, probably, from the introduction of artillery and the use of fire-arms, that we may date the abolition of the qualified property which, in ancient times, a man might acquire in the person of his prisoner, taken in war, at least till his ransom was

sequel to the preceding, viz. "that the master has a property in the perpetual service of his captive negro," we may oppose the same general reasoning. For perpetual service or servitude, is only another name for strict slavery; and upon no principle of the law of England will a court of justice, at this advanced period of civilization, attempt to enforce so improvident an engagement (34).

Again; are we to understand, as we read in one chapter, that "a clerk, presented for institution, may be refused by the bishop, if he be a bastard[h];" or is it, as we are informed in another chapter, that "the disqualification of bastardy from holding any dignity in the church is now obsolete," and that, "in all other respects, there is no distinction between a bastard and another man[i]?" Neither, again, is it correctly stated, that in all other respects there is no distinction between a bastard and another man; for the law (perhaps in favour of marriage) is much less indulgent to bastards than to legitimate children. Thus, the limitation of a remainder to an unborn bastard is void[k]. And so, again, in our courts of equity, there is

h Bl. Comms. 1. 389.
i Bl. Comms. 1 459.
k Co. Litt. 3. b. 1 P. Wms. 529.

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paid. When men fought, sword in hand, and body to body, every man might personally make his own prisoner; but, since the more combined tactic, introduced by the use of artillery and of fire-arms, it is no longer individually that prisoners are taken, but in the mass, and, consequently, they belong to the state as a public security for the protection and good treatment of the prisoners taken on the other side, until their final exchange.

(34) Adjudged in 1772, when James Somerton (a negro) was brought before the court by habeas corpus, and immediately discharged. 11 St. Trials, 340.

not the same favour shewn to bastards as to legitimate children. Thus, on a covenant *to stand seised*, an use will not rise to a bastard, because the considerations of lawful blood and marriage, which are peculiar to such covenant, necessarily exclude bastardy[m].

Quære again, whether buying and selling bank stock, or other government securities, will not make a man a bankrupt, they not being *goods*, *wares*, and *merchandize*, within the meaning of the statute, &c.[n]?

There is no difference, I apprehend, with respect to the question of bankruptcy, whether the buying and selling is of bank stock, and other government securities, or of goods, wares, and merchandize; but, if a man is in the continued practice of buying and selling for profit, he will, in either case, be held to be equally liable to become a bankrupt. It is not the having the stock, or occasionally dealing in the stock, that makes the bankrupt[o], but the continued practice of buying and selling for profit. Thus, if a man buys and sells stock by *commission*, he is only a species of broker, and consequently is liable to become a bankrupt; which plainly shews, that the distinction, which the law looks to, is not that which relates to the quality of the commodity bought and sold, but that between occasional dealing and the continued practice of buying and selling for profit.

Quære again, whether in those chapters, that were founded by Henry VIII. out of the spoils of the dissolved monasteries, the deanery is donative, and the installation merely by the king's letters patent[p]?

m Co. Litt. 123. a. And see the note 189. ibid.
n B. C 2 476.
o See the stat. 13 & 14 C. 2. c. 24.
p B. C. 1. 382.

The statutes prescribing presentation to the deaneries of the new foundation, were considered to be informal, and consequently void, till they were subsequently confirmed by the stat. 6 Ann. c. 21.; and, therefore, it seems Lord Coke was fully justified in describing those deaneries as donative[q]. But, since the stat. of Ann. above mentioned, the deans of some, if not of all the chapters of the new foundation, are held to be *presentative* and not donative; the practice being to present the letters patent to the bishop for institution and a mandate of instalment[r].

Quære again, whether the writ of elegit gives the sheriff the power to deliver the moiety of the debtor's freehold lands to the plaintiff, to hold, &c[s]. On the contrary, it seems that the sheriff can do no more than make the necessary appraisement and return of the writ, after which the creditor must bring an ejectment in order to obtain possession[t].

Quære again, whether the prosecutor of receivers of stolen goods, has it in his choice *either* to punish the receivers for the misdemeanor immediately, before the thief is taken, *or* to wait till the felon is convicted, and then punish them as accessories to the felony[u]. The words of the statute (5 Ann. c. 31. s. 6.) are, "if any such principal felon *cannot be taken* so as to be prosecuted and convicted, it shall and may be lawful to prosecute and punish every such person buying or receiving any goods stolen by any such principal felon, knowing the same to be stolen, as for a misdemeanor, to be punished by fine and imprisonment, &c." So far, then, from the prosecu-

q Co. Litt. 95. a.
r See the notes 102 & 105, to Co. Litt. 95. a.
s B. C. 3. 419.
t Tidd's Practice, 930. And see 3 T. Rep. 295. Taylor v. Cole.
u Bl. Comms. 4. 133.

tor's having two methods in his choice, either to proceed immediately for the misdemeanor, or afterwards for the felony, when the principal is taken, it is then only when the principal *cannot be taken*, that he can prosecute for the misdemeanor, &c.; but where the principal is amenable, and not out of the reach of justice, the prosecutor has no option left, but must proceed against the receivers for the felony[x].

Again; if a traitor dies before judgment pronounced, or is killed in open rebellion, or is hanged by martial law, it works no forfeiture of his lands; for he never was attainted of treason[y]. "But, (says Blackstone,) if the chief justice of the King's Bench, the supreme coroner of all England, in person, upon view of the body of him killed in open rebellion, records it and returns the record into his own court, both lands and goods shall be forfeited[z]. Now this is, in substance, taken from the 4th Report;" and it seems that the ancient law was so[b]; but it has been since held, and so it was long before Blackstone wrote, that none can be attainted after death but by act of parliament[c]. It follows, that, in the present instance, the forfeiture can be only of the goods, and not of the lands, as is here asserted[d].

But it is now time that we should say something of pleading; for, according to the prevailing system, it is to this branch of learning our attention is principally directed. Let us see, then, how far the study of Blackstone is to be relied upon for educating and forming pleaders.

x Forster, 374. See also the K. v. Wilkes. Cases in C. L. 98.
y Co Litt 13. a
z Bl. Comms. 4. 382.
a 4 Co. 57
b Co. Litt. 390. b. and note 345.
c 2 Hale, 53.
d Hawk. P. C. 4. 475. 1 Hale, 342. 349.

It is to be observed, that there are four principal statutes which are said to constitute the foundations of special-pleading: 1st. the statute 32 H. 8. c. 30. by which an informal issue, upon a material allegation, is held to be cured after verdict. As if the defendant, in an action of debt on bond, pleads "not guilty," instead of "*nil debet*," the allegation is material, but the issue is informal. 2nd. The stat. 27 Eliz. c. 5. which enacts, that matters of form must be *specially* demurred to, and not *generally*; as, if the defendant prays *oyer* of a deed which is not regularly before the court by the *profert* on the other side. 3rd. The stat. 16 & 17 C. 2. c. 8. by which immaterial defects are cured after verdict; as, if the plaintiff, in trespass, omits to allege the certain day and place; or the defendant, in justifying, does not aver that the cattle were *levant* and *couchant*. 4th. The statute 4 & 5 Ann. c. 16. by which immaterial defects are cured after judgment by default, in which there is no verdict, and which are consequently not within the statute of C. II.

We must distinguish, in the present instance, between those defects which are cured by statute, and which are properly called *jeofails*, in pleading, and those which are cured by verdict at common law. For, in the first place, the former are always in the traversing, but the latter in the allegations; 2nd. the former extend only to immaterial or collateral points, but the latter are always upon those points which are material; 3rd. the former cannot be demurred to otherwise than specially, but the latter are bad upon a general demurrer; and, 4th. no exception can be taken against the former after judgment by default, in which there is no verdict, because of the statute of Anne, but that is not the case with respect to the latter.

Now, it is not a little remarkable, that upon all these four statutes of jeofails, Blackstone happens to be uniformly mistaken. For example: he says, "if the declaration or plea omits to state some particular circumstance, without the proving of which, at the trial, it is impossible to support the action or defence, this omission shall be aided by verdict. As if, in an action of trespass, the declaration does not allege that the trespass was committed on any certain day; or the defendant justifies, by prescribing for a right of common for his cattle, and does not plead that the cattle were levant and couchant on the land[e]." It is true, that the operation of a verdict, at common law, is to cure the defects in the pleadings upon all such material points, as must necessarily be presumed to have been proved before the jury, in order to support the action. Suppose, for instance, the plaintiff, in an action of trespass, obtains damages upon an insufficient averment, or the defendant justifies in another's right, without setting forth the stranger's title, this is, in either case, a material defect, and the adverse party may take advantage of it, either upon general demurrer, or after judgment by default, in which there is no verdict; but if he takes issue, and has a verdict against him, the defect is then cured by the verdict at common law. But, in the examples which are put by Blackstone, the case is widely different; for, the averment of the certain day in trespass, and of the levancy and couchancy in a justification, are neither of them upon those material points which must necessarily be presumed to have been proved before the jury, in order to support the action[f]. On the contrary, these are mere jeofails or slips in the pleadings, and are, therefore, unexceptionable upon a general demurrer, because of the statute of Eliz. and equally so after judgment by default,

e Bl. Comms. 3. 394. f Co Litt. 283, 284. a. b.

because of the statute of Anne; which is exactly the reverse of those defects which are material and cured by verdict at common law.

" But if the thing omitted," says Blackstone, " be essential to the action or defence, as if the plaintiff does not merely state his title in a defective manner, but sets forth a title that is totally defective in itself; or if, to an action of debt, the defendant pleads *not guilty*, instead of *nil debet*, these cannot be cured by a verdict for the plaintiff, in the first case, or for the defendant in the second[g]." If the plaintiff sets forth a title that is totally defective in itself, there is no doubt that this defect in the declaration destroys the merits of the action, and, therefore, cannot be cured by verdict. As for example: if the obligee declares in assumpsit against the heir, on a promise to pay money due on the bond of his ancestor, without declaring that the ancestor bound himself and his heirs, he shall gain nothing by his verdict; for the heir is not bound unless he is expressly named in the obligation of his ancestor, and unless the ancestor has also bound himself in the same bond[h]. And the heir could not have made himself subsequently liable by his particular assumpsit or promise; for, as there was originally no cause of action, there could be no consideration upon which the assumpsit could be grounded[i]. But where the defendant pleads *not guilty*, instead of *nil debet*, this is a defect in the traversing. It is an informal or improper issue upon a material allegation (35); and, therefore,

g Bl. Comms. 3 394.
h Co. Litt. 384. b. 386. a.
i Saund. 2. part. 1. c. 24.

(35) See Gilb. Hist. Com. Pleas, 147. In the case of Coppen, *qui tam*, *v.* Carter, the defendant pleaded "not guilty" to an

although the plaintiff may take advantage of it, if he will, before verdict, yet if he carries down the record to trial, and a verdict is had thereon, the mistake is rectified by the statute 32 H. VIII. of jeofails (36).

Again; we read that "the defendant craves *oyer* of the writ, or of the bond, or other specialty upon which the action is brought, that he may hear it read to him; the *generality of defendants, in the time of ancient simplicity, being supposed incapable to read it themselves;* whereupon the whole is entered *verbatim* upon the record[k]."

It is a rule, in pleading, that wherever there are deeds which are relied on, they must be regularly shewn to the court, without which the court can take no judicial notice of them. The doctrine of praying oyer is a consequence of this general rule. The plaintiff concludes his declaration with the profert, and he brings here into court the writing obligatory aforesaid; then comes the

k Bl. Comms. 3. 299.

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action of debt, on a penal statute, and it was held, that it did not warrant judgment to be signed for want of a plea. 1 T. Rep. 462.

(36) Upon the same principle, if the defendant pleads in abatement, after a general imparlance, or to the jurisdiction, after a special imparlance, the plaintiff may either sign judgment, or apply to the court to set aside the plea; or he may demur to it. But, if he replies, instead of demurring or alleging the estoppel, the fault is cured; for the plaintiff, by replying to the plea, has tacitly assented to its being received as such; and the court will not allow him to set it aside afterwards, for that would be inconsistent.

defendant and craves oyer of the said writing obligatory; for, being already in the possession or custody of the court, by the profert on the other side, there is no necessity for his setting it forth specially in his own plea. It is then read to him, not from the visionary and quaint idea of his either being a stranger to its contents, or incapable of reading it himself, but for the simple and obvious reason that the court may take judicial notice of it, which otherwise they could not do; and, thereupon, the whole is *not* entered *verbatim* upon the record, (as Blackstone says[l],) but only that part of the instrument which the defendant relies upon, and, therefore, shews to the court as material to his defence. Thus, upon his praying oyer of the bond, it is said, "and it is read to him," without more saying; but upon his praying oyer of the condition, it is said, "and it is read to him *in these words*, and accordingly entered *verbatim* upon the record as part of the pleadings[m]." And the reason of this distinction is, that the obligation, where there is a bond upon condition, is merely noticed as the introductory part of the instrument, of which the substantial is the condition; for it is the condition which shews the real nature of the debt or duty for which the obligation was given.

"And sometimes," says Blackstone, "after tender and refusal of a debt, if the creditor harasses his debtor with an action, it then becomes necessary for the defendant to acknowledge the debt and plead the tender; adding, likewise, the *encore prêt*, that he is still ready, &c. and sometimes the creditor will totally lose his money in such cases[n]." But have we any idea, from hence, of these supposed cases? Can we, by any possibility, guess at the principle? Or, do we know how to distinguish, (as be-

l Bl. Comms. 3. 299.
m See the Appendix to the 3d. vol. p. 22.
n Bl. Comms. 3. 303.

tween debts and contracts,) where the *encore prêt* should be pleaded, and where not (36)?

Another most material distinction to be attended to, with respect to the remedy which the law gives by action of trespass upon the case, for *injuries without force*, is that between *contracts* and *torts*, but which, like the former is entirely overlooked by Blackstone. The action of trover, for example, is described as an action of trespass upon the case, and so is the action of assumpsit for non-performance of promises and undertakings; and yet so essentially different are these actions in their nature and quality, that they are neither traversable by the same plea, nor do they admit of the same judgment. For, in matters of contract, the question is of the quantity of the damage, but in matters of tort, it is of the quality of the tortious or wrongful act, and not of the damage; a distinction which also opens to the important doctrine in pleading, of the joinder and misjoinder of actions (37).

The operation of terms to protect inheritances, which have now been in constant use in conveyancing for more than a century (38); the construction of the usual cove-

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(36) See the Appendix, prop. 14.

(37) See the Appendix, prop. 15.

(38) Terms, as they are used in conveyancing, to protect inheritances, have their operation upon this general principle, that where there is a competition of claims, and the equity of the parties is equal, he who has the law shall prevail. For example; the heir and the creditor who has obtained judgment, have each of them a claim upon the inheritance, under different titles, and are equal in equity, being both purchasers, in a legal sense, for a valuable consideration. So far then, the creditor is preferred in law, as being the older purchaser; because his claim is

nants and powers in marriage settlements (39); and many other equally common-place matters, relating to the same branch of learning, (such, for instance, as the explanation of *marriage articles* (40), *strict settlement* (41), and the

founded on the judgment had against the ancestor of those lands before they descended to the heir; *et qui prior est tempore potior est jure.* But, if there is a term of years subsisting in the estate, upon trust, to attend the inheritance, the equitable right of the heir, being thus fortified by the accession of the legal interest in the lands, during the continuance of the term, he is thereupon allowed to set up the term in bar of execution of the judgment; for the term was created prior to the judgment. And although the trust, or benefit of the term, is annexed to the inheritance, the legal interest of the term remains distinct and separate from it at law; and the whole advantage to be made of the term arises from that separation. See the note 249, to Co. Litt. 290. b. s. 13. and Sugden's Law of Vendors and Purchasers, ch. 16.

(39) See the Appendix, prop. 16.

(40) Marriage articles, are the heads or minutes of the agreement of the parties, (before marriage,) for making a settlement: as where A. in consideration of an intended marriage, covenants with trustees to settle an estate to the use of himself for life, with power, &c. remainders to trustees, &c. remainder to his wife for life, remainder to other trustees, &c. remainder to first and other sons in tail, remainder to the daughters as tenants in common with cross-remainders, remainder to the husband in fee. When an estate has been thus specifically agreed to be settled, it becomes a trust, which passes with the lands, into whose hands soever they come, and cannot be defeated by any act of the father or trustees.

(41) Strict settlement is, where an estate is secured to the issue of the marriage by a settlement, so framed as not to have it in the power of the parents to bar their issue, by fine or recovery. In these cases, the issue are held to take their estates by

nature of the security which the parties have against the trustees in case of alienation (42),) are exactly that sort of general information, which every intelligent law-student is expected to be acquainted with, but which he has no opportunity to learn from Blackstone's Commentaries.

That I may not, however, fatigue the reader's attention by extending these remarks to an unreasonable length, I will conclude by observing, that even the marriage settlement itself, in Blackstone, (which every beginner in this course of study will naturally presume to be a model of the kind,) is of the same inaccurate and incomplete description with all the rest; as may be seen by the omission of the usual powers of leasing, jointuring, and charging, after the limitation to the husband, and more particularly by the omission of cross-remainders after the limitation to the daughters[p]. For, by reason of

p B. C. Appendix to the 2nd. volume, p. vi.

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purchase, and not by limitation; they are considered as claiming a provision, in the capacity of purchasers for a valuable consideration, under the purport and intention of the stipulated terms upon which the marriage was engaged that gave them birth.

(42) If the trustees for preserving contingent remainders, join in a conveyance to destroy them, a court of equity will consider it a breach of trust. And, in general, if the purchaser, under such conveyance, comes in for valuable consideration, and without notice of the trust, then will the remedy of the person claiming under the contingent remainders be against the trustees, who will be compellable, (by decree in chancery,) to purchase lands with their own money, equal in value to the lands sold by them, and to hold them upon the same trusts and limitations as they held the other. But, if the conveyance be *with notice* of the uses, or *without consideration*, in that case the purchaser shall hold the lands subject to the former trusts.

the daughters taking as tenants in common, and not as joint tenants, it might so happen that the reversioner might enter, living issue by the daughters, which evidently could not have been intended; and, although an omission of this kind might be supplied in a devise, by implication of law, there is no such implication to be admitted in a deed of settlement (43).

Upon the whole then, if it is true, as I have here suggested, that the law is a science capable of demonstration, and, therefore, demanding from us the exercise of an intelligent and reasoning mind, and not the labour of the hands in copying precedents; and, if it has likewise been fairly and truly stated of Blackstone's Commentaries, that they are but an abstract, superficial, and often incorrect sketch of the elements of the law, and nothing more, and which was originally intended for unprofessional readers alone, and not for students; if I am right, I say, in these two suggestions, it follows, that the system of education, which has given occasion to the foregoing strictures, independently of the irksome drudgery that attends it, is at once an ineffectual and absurd system, and such as cannot but produce infinite embarrassment to the individual, and every possible mischief and inconvenience to the public.

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(43) If A. devises black-acre to B. and white-acre to C. in tail, and if they both die without issue, then to D. in fee; here B. and C. have *cross-remainders* by implication; that is to say, on the death and failure of issue, of either of them, the other and his issue shall take the whole; and D's. remainder over shall be postponed till the issue of both shall fail. But it is otherwise if A. makes the same conveyance "by deed"; for the construction of a deed is always "*stricti juris*", according to the ancient simplicity of the common law. See the note 82. to Co. Litt. 195. b.

With this reflection, I shall, therefore, venture to conclude this first part of our present Inquiry, and not without a hope, that the hints which are contained in it may be useful to others who engage in the same course of study. The public have done ample justice to Blackstone's Commentaries, and most willingly do I subscribe my feeble testimony in acknowledgment of the extent of their claims to it; they have enabled many an unprofessional reader, (who would probably have read nothing else,) to form to himself a general notion of at least the outline of this interesting and important learning; and, were it only in this single view of them, the value of their publication would be unquestionable:—

Neque ego illi detrahere ausim
Hærentem capiti multâ cum laude coronam.

In the midst, however, of these deserved praises, let us beware of so far deceiving ourselves, and at the same time of doing such an injustice to Blackstone, as to set up his commentaries as an institute for educating and forming lawyers. In the rank of elementary composition, they might for ever have reposed beneath undisturbed laurels; but he who would make them the institute of his professional education, improvidently forces them into an element which is not their own, and lays the foundation for those perilous misunderstandings,—that unlawyer-like jejune smattering, which informs without enlightening, and leaves its deluded votary at once profoundly ignorant and contented.

ON

THE SCIENCE OF THE LAW,

&c. &c.

PART II.

I PROCEED to claim the attention of the studious reader to the plan of education recommended by that eminent and learned judge, Lord Ch. J. Reeve, who has left us his opinion in those emphatic words, that "the best, the easiest, and the shortest way for a man to be educated and formed to be a lawyer, is to make himself master of Lord Coke's Commentaries on Littleton's Tenures:"—

> Him if we will hear,
> Light after light well-used we shall attain,
> And to the end persisting safe arrive.

To facilitate, in some degree, the proposed scheme of instruction, in which we are all so deeply interested, will be, therefore, the object of the following considerations. There is always, at least, some merit in endeavouring to smooth the way to science, and to make its path practicable. If it does but bring the subject fairly into discussion, and stimulate to further inquiry, the undertaking is respectable and deserves attention; and more particularly so, in the present instance, from no explanation of the same kind having been previously supplied by any other writer.

From the period of the accession of the Norman dynasty in the eleventh century, our ancestors had long to struggle against the imposition of that last badge of slavery,—a foreign jurisprudence. They saw, with jealous indignation, that the judges were regularly appointed from among the Norman prelates, that the proceedings in the king's courts were used to be carried on in the Norman instead of the English language, and, above all, that repeated attempts were made to introduce the imperial or civil code,—the favourite study, at that time, of the popish clergy, and probably much better adapted than the simple and inartificial maxims of the ancient common law, to promote the doctrines and practice of slavery. It was not till about the middle of the fourteenth century, by the stat. 36 Edw. III. c. 15. that this contest was at last finally terminated; the proceedings in the king's courts being ordained, from that period, to be carried on as before, in the English language; and, although the clergy were still permitted to follow the practice of the civil law, within the limits of the ecclesiastical jurisdiction, they were obliged to confine themselves, in reading and teaching it, to their own private schools and monasteries.

Under these circumstances, the study of the common law (in which the clergy, who had gradually withdrawn themselves from our temporal courts, had therefore now no longer the same interest,) soon became a principal branch of education among the laity; and began to be generally attended to by every gentleman and scholar in the kingdom. Our Inns of Court, of which there were several founded about that period, are said to have been crowded with young men of family, who resorted there to read and to hear lectures; and many very useful legal treatises were published for their particular instruction

or direction. It would be but little to the purpose, however, of our present inquiry, to discuss the merits of those various sources from which the materials of professional learning were used to be supplied, with probably little variation, till about the middle of the 15th century, which brings us to the consideration of the admirable treatise of English Tenures, compiled by the venerable and learned Judge Littleton, in the reign of Edward IV.

This excellent tract, (one of the few of those ancient date which are still of intrinsic authority in our courts of justice, and do not entirely depend on the strength of their quotations from the opinions or reports of others,) consists of a series of seven hundred and fifty theorems, selected, in substance, from the Year Books (1), and of which the subsisting authority upon points of law, after having stood the test already of more than three hundred years, evinces the extraordinary discernment and judicious forecast, that have been exercised in the selection. But it is not upon points of law alone, that I have now to claim the reader's attention to Littleton's Tenures; for, independently of their *professional* merit, which is admitted to be unquestionable, they hold likewise a principal rank among works of *institutional* celebrity; and which is amply justified by their acknowledged propriety of arrangement, their perspicuity of language, and, above all, by the admirable specimen they exhibit, and which they preserve through the whole tenor of the various matter they contain, of characteristic technical

(1) The Year Books are the reports from the reign of Edward 2. inclusively, to that of Henry 8. taken in a regular series by the prothonotaries, or chief clerks of the court, at the expense of the crown, and published annually.

precision, and a constant train of close and profound reasoning (2).

We do not exactly know what interval there may have been, between the decease of the learned judge and the publication of his Tenures; but it is certain they were already in high esteem, and were commonly known and cited in the reign of Henry VIII. Down to the period at which Lord Coke published, in the beginning of the reign of Charles I. they continued to be equally so; and, as far as may be inferred from the abundant commendations bestowed upon them, were used to be already then distinguished in the profession, as the commonly received institute for educating and forming lawyers. And this too was the book upon which Lord Coke himself commenced his professional labours; and not *commenced* only, for, having diligently mastered it, like the rest of his fellow students of that day, he adopted it ever afterwards as his common-place book. It was his custom to mark down every material case that occurred to him, whether in reading or in practice, together with its proper legal note or comment, under some one or other of the seven hundred and fifty sections in Littleton; and having begun to take notes (as appears from what he himself tells us[a]) as far back as the 14th of Eliz., and continued so to do till the 3d of Charles I. when he published, it was during that long period, of no less than 56 years, that

a Co. Litt. 148. a. ibid. 222. b. ibid. 394. a.

(2) The contents of the third book are more properly Littleton's own doctrines; the first and second books being, for the most part, an arrangement of the old Tenures published in the reign of Edward 3.

he made it the register of his daily labours, the repository of all his legal learning and opinions. And here one cannot but admire, that in the variety of subject he embraces, there is nothing he seems to be unacquainted with, nothing of which he ever shrinks from the discussion. He takes his range, as it were, through the whole circle of the science, of which he enters into all the details, and expatiates upon the minutest parts and branches, with the same professional acuteness and scientific accuracy,—as masterly in pleading, as he is great in titles, and as great in the general law of the land, as he is powerful in the law of landed property.

The work then, which Lord Coke has thus transmitted to us, and which is called, by way of eminence, *The Institute*, (an honorary distinction which has never been paid, as it is said, to the works of any other writer,) so far from being but a commentary upon Littleton's Tenures, is, in fact, a repository of all that is interesting or useful in legal learning, continued from the earliest period as far down as the 17th century, and forms, till then, a sort of general digest of the law, of boundless information, and replete with the most profound reasoning. It embraces nothing less than the knowledge of the principles of British jurisprudence, pursued with unparalleled penetration and unexampled strength of intellect, through their countless varieties, and combinations :—

> **Labori faber ut desit, non fabro labor,**
> **Materiæ tanta abundat copia.**

But let us now take the other side of the question. For there never yet has been any one work of transcendent merit, which has not had a host of objectors to it. It was thus the schoolmen, when they could no longer compre-

hend Aristotle, bethought themselves of decrying his philosophy. They revenged on the philosopher, the mortification of being puzzled by his doctrines, and what they were conscious they had not the wit to understand, they pretended to be no longer worth the understanding.

> A second deluge learning thus o'er ran,
> And the monks finished what the Goths began.

But to return to the monks of our own profession. They object, in the first place, that "there is a great deal of what was law in Lord Coke's time, which is not the law now." Certainly; the revolutions, that have taken place in our civil liberties, from the commencement of the 17th to that of the present century, have necessarily produced a corresponding revolution in our legal polity, and many material alterations have been since adopted in the administration of private justice. These, however, are of so recent a nature, as to be attended with no serious difficulty, to those who would be at the pains of collecting them, for, in effect, they are part of the history of our own period; while they also lie within so small a compass, that, taking the Institute for the parent-stock, they are such as may be easily and speedily engrafted upon it at any time. Indeed, to speak accurately, our system of of laws has undergone no revolution, but only an alteration in these instances; and with respect to what the law was before these alterations were adopted, and more particularly in what relates to the forms of proceeding in real actions, this species of information is indispensably necessary to the student, in order to enable him to apprehend the reasons and principles of many of the subsisting proceedings in modern practice; it is the foundation which is required to be first laid, before we attempt the superstructure.

The proceeding by writ of entry, for example, (which is now disused in practice, excepting that the form only is preserved in common recoveries,) is it not the key to the subsisting doctrine of remitter? If the tenant who had right to the land, but was out of possession, had afterwards the freehold cast upon him, by some subsequent defective title, and entered by virtue of that title, he was liable to be evicted in a writ of entry; for the writ of entry did not meddle with the right of property, but only went to *disprove* the title of the tenant, by shewing its unlawful commencement; and, in that case, the tenant would have been driven to his writ of right, to recover his just inheritance; to avoid the inconvenience of which the law gives him remedy by remitter. In the same manner, again, it is in the disused proceeding by writ of assise, in which the demandant was required merely to *shew his own title*, and not to disprove that of the tenant, that we must look for the principles of the more modern mode of proceeding by ejectment. And although, perhaps, there are few recent instances to be met with, of the prosecution of real actions by writs of entry, assise, formedon, writ of right, or otherwise, yet as these actions are still in force, and still part of the law of the land, they will consequently still form a necessary part of the education of the law student: there are precedents to be found of their having been more than once resorted to, within the last fifty years[b]; and, as it is naturally to be expected that cases will again occur, in which the proceeding by ejectment will be an insufficient remedy, we cannot say how soon we may not have further occasion for them.

Again, let us take the common case of a distress being

b See the note 155. to Co. Litt. 239. a.

a bar to a re-entry. If A. makes a lease to B. with condition of re-entry upon non-payment of the rent, and afterwards the rent is in arrear, the acceptance of it, after the day of payment, does not bar the right of entry, which instantly vested in A. upon the non-payment; for, the rent being a duty and owing, the party may well accept it as such; but, if he distrains in the like case, the distress becomes a bar to his re-entry, and affirms the continuance of the lease[c]. Why? Is it not the same rent in either case? or what difference can it make whether the landlord is paid that rent, or whether he pays himself by distraining for it? I answer, we must have recourse to the old law, in order to clear up this difficulty. For, before the stat. 21 H. VIII. the landlord who distrained for rent, was obliged (upon principles which had relation to the feudal policy,) to avow upon the person of his particular tenant[d]. As the nature of a distress, under the old law, amounted, therefore, by necessary implication, to an affirmance of the tenancy, at the time of the distress taken, it consequently became a settled maxim, or rule of law, that if the landlord distrained for the rent-arrear, he could never afterwards avail himself of a breach of condition which happened precedently; for conditions to defeat estates are odious in the eye of the law, and, having been once waved, are presumed to be for ever abandoned (3).

But to return to the objections now under considera-

e Co. Litt. 211. b. and Salk. 3, 4. d Co. Litt. 268. b. 269. a. 312. a.

(3) Co. Litt. 219. b. 274. b. Upon the same principle, distress is a waver of "notice to quit;" but acceptance of rent in such case, is no waver. See Cruise's Law of real Property, 1. 274. and 283.

tion; it is said, there is a great deal of obsolete and consequently useless learning in the Institute, and, more particularly, in the innumerable exemplifications which Lord Coke gives us of the operation of the feudal doctrines and principles. And here, indeed, with respect to the mere matter of practical instruction, I do not mean to contend that Lord Coke's details of the learning of the old law are always strictly to the point. Perhaps the few chapters to which this observation will be found particularly to apply, are those upon villeinage, knight's service, and escuage, which last, under the feudal system, was the pecuniary commutation for personal service, and has probably been the parent of the land tax of later times. But, although we have no longer to make the same application as formerly, of the alleged doctrines, it by no means follows that they are not reproducible in some other shape, or at least, that the insight they afford into the theory of the ancient practice, will not be often of infinite advantage to us, in supplying us with general principles, and in throwing light upon many of our modern procedings. We may think it to be of little or no consequence, for example, to learn whether the guardian in chivalry, who had seisin of the wardship of the heir and of the lands, might have assigned them both or either of them to a stranger "by deed" or "without deed;" or whether or not, in the case of a lease for years of a villein, the lessee might have assigned over without deed, or by deed alone[e]. And yet the consideration of these apparently obsolete cases; brings us acquainted with the nature and principles of the law of assignments in general; not of wardships and of villeins alone, but of chattels of every other species and denomination (4).

e Co. Litt. 85. a.

(4) See the Appendix, prop. 17.

We have also to recollect, upon the present occasion, that the abolition, (as it is called,) of the feudal tenure, by the stat. 24 Ch. II. extended no further than to that of the military and oppressive services. Thus, we have still remaining, together with the spiritual service of frankalmoigne, the honorary services of grand sergeanty, which are strictly feudal; the tenure by free and common socage, which was only a feud of an improper kind; the tenure by petit sergeanty; the tenure in burgage or town socage; the customary tenures of borough-english, and gavelkind; and the tenure by copy of court-roll, in ancient demesne or otherwise, which is lineally descended from pure villeinage. In the same manner, again, the subsisting incidents to these several tenures, the fealty, which is common to all tenures except frankalmoigne, the services in rents, or otherwise, and those likewise which are incident to copyhold-tenures alone,—as heriots, wardships, fines, and the like, are all of them of the same feudal family and character. Indeed, there is constantly kept up, through the whole system of our law of landed property, so general and intimate a relation to the ancient feudal doctrines and principles, that he who is not well instructed in the latter, will never be able to attain to an accurate and masterly acquaintance with the former. In what point of view, for example, will he be able to reconcile to himself those subsisting maxims, "that the father shall not be heir to the son?" "That the successor to the inheritance shall be accounted an heir, and not a purchaser?" "That the freehold shall not be in abeyance?" "That after-purchased lands shall not pass by a devise?" "That in the conveyance of an estate of inheritance, the word given *(dedi)* shall be held to imply a personal warranty, as a consequence of tenure, which is not implied in the word *(concessi)* granted?" "That the alienation of a copyhold shall be by surrender into the lord's hands, and not

by livery of seisin to the party, and that such surrender shall be construed by way of limitation of the use alone, and not by way of transfer of the possession?" and so forth.

It is to be remarked, that the same kind of objection has been likewise extended to the two concluding chapters in the Institute, upon attornment and warranty; the efficacy of attornment having been nearly abolished, since Lord Coke's time, by the statutes 4 and 5 Ann. c. 16. and 11 G. II. c. 19; and that of warranty by the former of those statutes. But, independently of the present use of attornment to create the privity of estate, which is required in certain cases, (as where the lessor grants over the rent, and the lessee attorns, the attornment creates *that privity* between the lessee and the grantee of the rent, without which the latter cannot bring an action of debt against the lessee, for thereunto privity is requisite; and again, it serves to give the actual possession to a mortgagee or to him who has acquired only the right of possession, as the remainder-man, after the death of the particular tenant, making him, thereby, the legal owner, as fully as if he had recovered in ejectment against the lessee,) independently, I say, of this, which is the present use of attornment, it serves likewise as a general doctrine to throw much light upon the law of releases of estates. For, I apprehend a release *per clargir le estate* to be, in substance, no more than the grant of the reversion, in whole or part, to him who, at the common law, would have had the right to attorn to such grant, if made to a stranger. Suppose, for instance, A. leases to B. for years, and afterwards releases generally to B., it operates as an enlargement of B.'s estate from a chattel to a freehold. Why? Because, if A. had granted the reversion to a stranger, B. would have had the right to attorn thereto, at the common law; but, if A. leases to B. for years, and after-

wards B. leases to C., for half the term, and, afterwards, A. releases, generally, to C., this is a void release, and of no effect. Why? Because B. and not C. was the person who had the right to attorn, at the common law, to A.'s grant of the reversion to a stranger. I conclude, that, in all cases in which a release is so made to the tenant, who had the right to attorn at the common law, when attornment was necessary, it will be found to be a good release *per clargir son estate*, if made by him who is next in the reversion (5).

Again, with respect to warranties; the use of express warranties has, indeed, been generally superseded in modern practice, by the introduction of outstanding terms to attend inheritances, to which a warranty is no bar, but to a claim of the freehold only; for warranties are not against estates, but against droits (6). It is also observable, that, in many cases, a covenant extends further than a warranty[f]; and, indeed, generally speaking, the increase of personal property, since Lord Coke's time, has rendered a covenant, (in which a man covenants not for himself and

f Co. Litt. 385. a. and see the note 343. to Co. Litt. 389. a.

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(5) See the Appendix, prop. 18.

(6) A warranty does not extend to any lease for years, though it be for a thousand years; or to estates by statute staple, or statute merchant, or elegit, or any other chattel, but only to freeholds or inheritances. In the former cases, the law has provided the parties with other remedies, viz. by action of covenant, or action of trespass upon the case, as may be. Accordingly, in all actions which the termor or lessee for years may have, a warranty cannot be pleaded in bar; but in those actions wherein the freehold or inheritance comes in question, there the warranty may be pleaded. Co. Litt. 101. b. 365. a. 378. a. 389. a.

his heirs alone, but also for his executors and administrators (7), and thereby pledges his personal as well as his real assets,) a better security than any warranty, which attaches to the latter of these alone, and not to the former. But, notwithstanding every allowance which is to be made for the present disuse of warranties, and although the effect and operation of warranties have, by repeated acts of the legislature, been reduced to a very narrow compass, they are still a most interesting and useful article of legal learning, and more especially so, because there is no part of our jurisprudence to which the ancient writers have more frequently had recourse, in order to explain and illustrate their legal doctrines. But this is not all: the statute of Anne has made void no other than the tenant for life's warranty against the remainder-man or reversioner, and all collateral warranties, where the ancestor had no estate of inheritance in possession against the heir; so that, these only excepted, warranties are still in force, are still part of the law of the land, and continue to deserve the attention of every professional gentleman who would make himself accurately acquainted with the law of alienation or settlement of landed property (8). We may add, that in the chapter

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(7) The executors and administrators are always bound in such case, though not named.

(8) Suppose, for instance, the common case of a limitation to the first and other sons successively in tail-male, if the first son, when in possession, levies a fine, it operates as a discontinuance of the remainders to the other sons; and the reason that they cannot afterwards defeat the discontinuance is, because of the warranty which is contained in the concord of the fine, and which is a bar to them, even without assets. And so it is if the tenant in tail make a feoffment with warranty. See the note (238) to Co. Litt. 373. b.

which treats of warranty in the Institute, there are likewise contained many valuable and instructive readings upon different statutes, together with much useful learning upon the law of descent (9), of contingent remainder,

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(9) Among the few salutary municipal institutions, in which, perhaps, we may take example from our neighbours of the continent, we may remark the purely civil act of the public register of births and marriages. In the study of the history of other nations, (says Livy in his beautiful preface,) we should particularly attend to those things, which are worthy of imitation in our own, "*ut inde tibi tuæque reipublicæ, quod imitere capias.*" Impressed with this sentiment, I venture to submit the following reflections upon the present subject. The usage of inscribing, by the civil magistrate, the births of new born infants in a public register, is said to have been introduced, for the first time, about the close of the 2d century, by the Emperor Marcus Aurelius. It was introduced in France, in the reign of Louis the 15th, and has continued from that period to form part of the municipal law of the French nation. Indeed, it is fully obvious that the register of baptism must be frequently a very fallible evidence of the births of new born infants. The succession of many a rightful claimant has been often totally defeated through the difficulty of establishing the proof of a descent upon this sort of evidence, in order to shew a good title. But this is not the only inconvenience: the Jews reject baptism altogether, and the Anabaptists only administer it to adults; and yet, in point of legitimacy, the law makes no distinction between the new born infants of Jews and Anabaptists, and those of Protestants. There is the same argument in favour of the public register of marriages by the civil magistrate. And, by way of concluding the subject, the public register of deaths, analogous to the *acts of decease* of the French law, might be also recommended as not unworthy the attention of our legislature. As the law at present stands, the civil magistrate (the coroner) is only applied

of estoppel, of rebutter, and so forth. It is the doctrine of warranty which also discloses the general principles of the construction of assets in the hands of the heir, and shews the ground of the distinction which the law takes between a real and personal lien, and real and personal execution (10).

It is thus (to repeat Lord Coke's own words) "there is no knowledge, case, or point in law, seem it never of so little account, but will stand the student in stead, at some time or other, and therefore, in reason, nothing ought to be prætermitted[g]."

In our earlier studies, we are usually much too apt to disregard the ancient learning, of which the subsequent alterations that have taken place in modern proceed-

g Co. Litt 9. a.

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to, in the extraordinary cases of persons dying in prison, or coming to a sudden or violent death. But the enactment of a general law, (by which the local magistrate might be required to verify and register the decease, in all cases, before interment, and where the deceased was from home, at the time of his decease, the same to be notified to the local magistrate of the county, in which he usually resided; and by which likewise a mortuary register might be appointed for persons dying *at sea*, or *beyond* sea, to be subscribed by two attesting witnesses,) would not only in many cases prevent the embezzlement of the effects of the deceased, and much fraud and imposition from strangers, but would also greatly tend to facilitate the proof *of descents*, which, from the failure of the inquisitions *post mortem*, since the abolition of the military tenures, is often become extremely inconvenient and difficult.

(10) See the Appendix, prop. 19.

ings, have superseded the apparent practical application. The decision which has no longer the stamp of a precedent upon the face of it, is set aside as of no account, or disregarded as antiquated and obsolete; and yet, when we reflect on the endless variety of matter which may be indirectly drawn into judicial discussion, we must be sensible that no one can say what precedent may not be eventually reproducible, however ancient, or what principle or rule of law, however obsolete or disused it may be, we may not, at some time or other, have an opportunity of again and again applying. There is no knowledge of this kind, which may not, sooner or later, be in fresh demand; there is no length of time nor change of circumstance that can entirely defeat its operation, or destroy its intrinsic authority. Like the old specie withdrawn from circulation upon the introduction of a new coinage, it has always its inherent value;—the ore is still sterling, and may be moulded into modern currency.

In order to elucidate these general arguments, let us take the three following examples:—

1st. The common law hath provided, that if any ecclesiastical person be chosen to any temporal office, he may have his writ *de clerico infrà sacros ordines constituto non eligendo in officium, &c.* and thereof be discharged[h].

2nd. *Et illi de eâdem terrâ, &c.* And they (of Ireland) are not bound by the statutes made in England, *because they do not send knights* to our parliament[i].

3rd. King Stephen did found the abbey of Feversham,

h Co. Litt 96. a.

i Co Litt. 141. b.

in Kent, *et dedit abbati, &c.* who, albeit, he held by a barony; yet, because he was never (that I find) called by writ, he never sat in parliament[k].

Now, with respect to the first of these apparently obsolete quotations, might it not have been fairly relied upon, within our own personal recollection, when it was solemnly debated in parliament, "whether the clergy were eligible or not, of common right, to a seat in the House of Commons(11)?" It shews, for instance, that the non-interference of the clergy in lay services, (and serving in parliament was specifically neither more nor less than any other kind of lay service,) was originally optional on their part, and not compulsory; for, if the writ, which is here mentioned, had been intended to operate by way of exclusion, it would have been issuable by the court *ex mandato regis;* but this, on the contrary, was a writ given by the common law *ex debito justitiæ*, to be had out of the Hanaper Office, at the suit of the party himself who was to be benefited by it, and, consequently, was not issuable but only at his own discretion. For every man is at liberty to decline the acceptance of that which is conceded to him for his benefit, if he will; *quilibet potest renunciare juri pro se introducto*[l].

But why, then, having the election, did they not serve in parliament? I answer, because there was formerly no

k Co. Litt. 97. a. l Co. Litt. 99. a. ibid. 223. b.

(11) The consideration of the present question may be still interesting to a certain point, as it may serve to ascertain whether the stat. 41. G. 3. c. 63. by which the clergy are declared to be ineligible, &c. was a merely declaratory statute, or introductive of a new law.

greater advantage to be derived from serving in parliament, than there is at this day from serving upon a jury, or attending the court leet, or view of frank-pledge, or the like. At the period alluded to, they were considered to be equally unprofitable services, and all of them more or less burthensome; so that every man was glad to excuse himself from being elected to the discharge of them, if he could. But, as the overflowing of waters, (says Lord Coke,) doth many times make the river to lose its proper channel, so in times past, ecclesiastical persons, seeking to extend their liberties beyond their true bounds, lost or enjoyed not those which of right belonged to them(12). It was thus, by long disuse, the qualification itself became

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(12) It was, probably, in the same way the right of the spiritual lords to sit upon trial for capital offences was at first doubted, and finally disputed. The bishops, before the reformation, had always enjoyed a seat in parliament; but so far were they, anciently, from regarding that dignity as a privilege, that they affected rather to form a separate order in the state, independent of the civil power, and accountable only to the pope and their own order. By the constitutions, however, of Clarendon, enacted in the reign of Henry II. they were *obliged* to give their presence in parliament; but as the canon law prohibited them from assisting on capital trials, they were allowed in such cases the privilege of absenting themselves;—a practice, which was at first voluntary, became afterwards *a rule;* and, on the Earl of Stratford's trial, the bishops, who would gladly have attended, and who were no longer bound by the canon law, were yet *obliged* to withdraw. Their protest, upon these occasions, being considered as a mere form, has been always admitted and disregarded. We may add, that this was also probably the way in which the bishops lost their right to be tried in parliament; not as Blackstone suggests, "because they are not ennobled in blood," for that would equally be an argument against every

questionable, and the concession of a privilege was mistaken for the imposition of a restraint (13).

Secondly, let us take the decision of the Star Chamber, in the reign of Henry VII. "that the acts of the parliament of England were not binding upon the people of Ireland, because they did not send knights to our parliament." And here I must beg leave to remark, that I do not presume to offer any opinion upon the nature of the political relation which subsisted, prior to the union, between England and Ireland; all I mean to contend for, is the reproducible quality of the decision now under con-

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peer who might be created by patent for his own life only; but because, by demanding a trial in parliament, the bishops would have admitted themselves subject to a temporal jurisdiction, from which, in ancient times, they always claimed a total exemption.

(13) The stat. 41 G. 3. c. 63. by which the clergy are declared ineligible to a seat in the House of Commons, has been confessedly framed upon the soundest principles of decency and propriety, as well as policy. But whether the clergy were disqualified or not, by the common law, *before the making of the statute*, is the present question. According to Blackstone, they were disqualified, because of their sitting in convocation. B. C. 1. 175. But this, I humbly conceive to be a very insufficient reason; for, by the same rule, the bishops would be equally disqualified from sitting as lords of parliament in the upper house, having also their seats in convocation. The argument seems to be much stronger *ab ordine relligionis*, which refers it to the impropriety of calling a man of religion, who has the cure of souls, from the discharge of his professional duties, (Co. Litt. 136. b.) and of whom *the law presumes*, that "he is resident on his benefice, and that he gives all his study to the cure of the church to which he belongs."

sideration, as it tends to show that the right of *taxation without representation* was held to be an unconstitutional doctrine, and, therefore, not tenable even in the arbitrary reign of Henry VII. and that too by the Court of Star Chamber, which consisted entirely of privy counsellors, who awarded their decrees without the intervention of any jury, and were universally odious to the people by reason of their arbitrary and violent proceedings in support of prerogative. It may, I think, be fairly assumed, that if the same constitutional view of the question had been attended to upon the latter occasion, it might have prevented the defection of the colonies in America, and all the eventful and calamitous consequences that followed in its train (14).

Let us now take the third example, "that the Abbot of Feversham, though a baron by tenure, yet was no lord of parliament, because he had never been called there by writ;" which serves, in the first place, to refute an ancient and still popular opinion, "that the acquirer of a territorial barony becomes thereby a lord of parliament[m]; and, secondly, to refute another equally popular though no less erroneous notion, "that the bishops continue to

m Selden's Titles of Honour, b. 2. c. 9.

(14) There is a reflection in Livy upon an event of nearly the same description, which is not unworthy the attention of the reader. He relates, that twelve of the colonies in Spain (of which there were thirty in number) had refused to supply the levies of troops to which they had been assessed, and that the senate expressed no other resentment upon the occasion, than that of passing over the names of those twelve colonies, in their next public report, in silence; upon which the historian concludes with this dignified remark, *Ea tacita castigatio magis ex dignitate populi Romani visa est.* Liv. lib. 27.

sit in the House of Lords, in right of succession to their temporal or lay fees, as barons by tenure[n]."

The former opinion is said to have had its rise, from a decision, mentioned in Blackstone, of the reign of Henry VI. by which Arundel Castle was adjudged to confer an earldom on its possessor[o]. And so it might be supposed to do, even at this day, if (as Blackstone explains it,) the actual proof of a tenure by barony becoming no longer necessary to constitute a lord of parliament, the record of the writ of summons, to him or his ancestors, has been admitted as a sufficient *evidence* of *the tenure*[p]. For, supposing a tenure by barony to have been that which originally constituted a lord of parliament, and the record of the writ of summons to have been only admitted, at a later period, *as evidence to supply the defect of the actual proof of it*, it seems to follow, that where the actual proof itself can be produced of this species of tenure, it ought to carry with it, at least, the same weight as the supplemental evidence to be deduced from the record of the writ of summons; and, consequently, the acquirer of a territorial barony would have, at least, as good a title to nobility as he who can produce the summons by writ.

It is not improbable, that, upon the original establishment of the feudal system, the whole territory of England was divided into knights' fees, of which thirteen (in value about 400 marks, or something more than 260*l.* sterling,) constituted a barony, and he who held that portion of estate in land, was, consequently, a baron by

n Bl. Comms. 1. 156. ibid. 1. 400. ibid. 4. 264. And see Bishop Warburton's Alliance between Church and State, p. 149.

o Bl. Comms. 1. 400.

p Bl. Comms. 1. 400.

tenure (15). But, afterwards, upon the creation of barons by writ, the tenure by barony began to be gradually and silently disregarded, till at last falling totally into disuse, it was held to be no longer the qualification of a lord of parliament, unless he could also shew the record of the writ of summons, which was personal to him and his ancestors, or to him and his predecessors. We cannot now say when, exactly, the law of nobility underwent this general change, but it was evidently at some time between the 11th of Henry VI. when Arundel Castle was adjudged to confer an earldom on its possessor, and the 21st of Henry VIII. which is the date of the dissolution of the monasteries, and which embraces an interval of seventy-three years. It became, in that interval, a settled rule of law, (as appears from the above-cited passage from the Institute,) that they only who had been called to the parliament by writ, should be considered from thence forward as lords of parliament, and have places and voices there[q]. "And," says Lord Coke, "if issue be joined in any action, whether baron or no, it shall not be tried by jury, but by the record of parliament, which could not appear unless he were of the parliament (16).

So far, then, from the record of the writ of the summons being admitted in aftertimes, as evidence of a te-

q Co. Litt. 97. a.

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(15) A knight's fee was supposed to be in value about 20*l.* sterling, per annum, Co. Litt. 69. a. b. Ibid. 83. b. There were, probably, about 60,000 knights' fees, and 700 baronies. See Hume's History of England, vol. 1. p. 472.

(16) Co. Litt. 16. b. Note, that Lord Coke speaks of barons by writ; for in the case of barons by letters patent, it is otherwise. See note (91) to Co. Litt. 16. b.

nure by barony, it became itself the principal and constituent title; and without it the tenure by barony was of no effect. As for example:—there were, anciently, one hundred and eighteen monasteries within the realm of England, whereof such abbots and priors as were founded to hold of the king, *per baroniam, and were called to the parliament by writ*, were lords of parliament, and had places and voices there. Of these there were twenty-seven mitred abbots, and two priors, as appears by the rolls of parliament (17). But it is to be observed, that tenure by barony alone, without being called to the parliament by writ, did not make the tenant of the barony a lord of parliament; for the Abbey of Feversham, in Kent, was founded, by King Stephen, to be held by barony; *et dedit abbati et monachis et successoribus suis manerium de Feversham, in comitatu Kanciæ, simul cum hundredo, etc. tenendum per baroniam.* And yet, notwithstanding he held by barony, the Abbot of Feversham did not sit in parliament, because he had never been called there by writ.

By the same rule, again, I conclude that the bishops do not sit in the House of Lords in right of succession to their temporal or lay fees, as barons by tenure, but in consequence of being called there by writ, which is personal to them and their predecessors, and to which they have a claim as prelates of the church, by ancient usage and custom, without any regard to their supposed baronial possessions. And this, (it has been remarked,) is more especially apparent in the instance of the new sees erected by King Henry VIII. upon the dissolution of the monasteries; the bishops of these never having had

(17) Blackstone says twenty-six mitred abbots and two priors. Bl. C. 1. 155. But see Co. Litt. 97. a.

any estates by a baronial tenure, and consequently having no claim to be called to parliament otherwise than as prelates of the church, and by reason of the usage (18).

But, to return to the objections to be considered. It has been said, that "we may learn more from the reports of cases than from the Institute." To this, however, it may be fairly answered, that the study of the Institute is necessary, even in this point of view, in order to *prepare* the student to understand the reporters. Lord Coke tells us, that the explanation of all the doctrines contained in his reports, is to be found in his Institute. It is likewise worthy of remark, that in the studying of the reports of cases, we have usually a very great difficulty to contend with; in the arguments of counsel being, for the most part, *falsely* pleaded, at least on the one side, and for no other purpose than to mislead. Hence it is but too often to be complained of, that, after wading through a long and perplexed statement, from which it rarely happens that any thing conclusive is to be collected, we are left more in doubt than ever we were, to choose between ambiguous and repugnant inferences. From the misrepresentations in which the subject is thus designedly involved, it is not without much labour and loss of time, that the point in dispute is to be at last finally disentangled. But, in the Institute, on the contrary, we come at once, without either preface or attempt at prejudice, upon the very information we are in quest of—the naked and

(18) See the note (217) to Co. Litt. 134. b. By the same rule, again, the bishops seem to have no right to sit in the court of the lord high steward, to try indictments of treason and misprision; for to the court of the lord high steward, no bishop, as such, *was ever summoned.*

undisguised decisions. We have no arguments of counsel to wade through, no latent fallacies to detect, no suggestions of sophistry or misrepresentation to disentangle, or explain away, nor any thing else that can divert our fixed attention from the immediate individual point to be investigated.

The learning of the Institute has also this further recommendation in its favour, and which can hardly be appreciated too highly,—"it saves us the irksome and laborious drudgery of plodding through the Year Books." If it were not for the Institute, we should still have to investigate each particular principle or point of law, through compilations infinitely more difficult and voluminous.

And now, I believe, I have reconsidered all the principal objections that have been usually made to the proposed course of study, and have shewn, at least generally, and as far as could be consistently done within the limits of a circumscribed inquiry like the present, that the learning of the Institute deserves to be the first and grand object in the scheme of educating and forming lawyers, and not the system of copying precedents in an office, and of reading and common-placing Blackstone's Commentaries. Let us proceed, then, to inquire into the method of reading and understanding "the Institute;" for there are many circumstances which render this undertaking of far more difficult execution than the student will be apt, at first sight, to be aware of. The want of method in the arrangement, the defect of perspicuity in the language, and the multiplicity of mutilated or mistaken passages, which abound through every chapter of that immense digest, are enough to bewilder the most ingenious, and to baffle the industry of the most enterprizing and indefatigable reader. The discussion of the difficul-

ties to which I here allude, is, therefore, a subject in which we are all most deeply interested; and it is only by laying them fairly open to the student, that he will be able to form to himself a right judgment of the sort of professional tuition he will require in order to surmount them.

And first, the want of an easier and more distinct arrangement in the distribution of the materials of the Institute, is a circumstance of inconvenience, no doubt, to the unassisted beginner, but which is inseparable, in some degree, from the very nature of the investigation in question. *Adeo enim*, (says Lord Coke, who has himself anticipated us in this reflection,) *adeò enim ipsa scientia involuta et copulata et complicata est.* In treatises of a lighter nature, the author has his materials to choose; he selects or shapes them according to his taste or judgment; expatiates, at discretion, upon the more ornamental, or more entertaining parts of his subject, and equally rejects or retrenches others which he conceives to be less inviting. There is not, perhaps, a more agreeable specimen to be met with of this kind of light superficial elementary writing, upon professional learning in general, than that which I have already so often referred to, in Blackstone's Commentaries. But, in the Institute, we have seen that Lord Coke adopted a quite different method, proportionate to the extent of his vast and profound researches, and such as might interfere the least with his accustomed professional avocations. During a long life of intense and unremitted application, he had treasured up an immensity of the most valuable common-law learning. This he wished to present to the public, and chose that mode of doing it, in which, without being obliged to dwell on those doctrines of the law, which others might explain equally well, he might produce that

profound and recondite learning, of which he felt himself to be so pre-eminently the possessor. "In adopting this plan," says his learned commentator, "he appears to have judged rationally, and consequently ought not to be censured for a circumstance inseparable from it[r]."

Secondly, it has been remarked, that when Lord Coke made Littleton's Tenures his common-place book, he made it the register of his daily labours, the repository of all his legal learning and opinions. It was there he used to note down every thing that occurred to him; and, probably, at the time it occurred to him, in sufficient words to revive the idea in his own memory, and frequently nothing more. It is likewise to be recollected, that, at the period at which Lord Coke flourished, there was usually no greater value attached to the labours of the compiler, than in proportion to their intrinsic merit. The modern craft of book-making, (if I may so call it,) was still a novelty; neither was it to have read many volumes that constituted the man of much reading, but to have read well and profitably what was much to the purpose. According to a well-known expression of the younger Pliny, it was *quàm multum legendum esse, non quàm multa.* At the period of which I am now speaking, these were no unfashionable doctrines; compression was not used to be sacrificed to ornament, nor the unaspiring pith and brevity of composition to be condemned as pedantic or unintelligible. If such, then, is the style of Lord Coke's writings, it is to be accounted for by the taste of the times in which he flourished, and which naturally led him to adopt the *non ingratam negligentiam hominis de re magis, quàm de verbo laborantis.* In the ardour to note down every thing which he conceives may

r See Mr. Butler's Preface to the 13th edit. p. 22.

be useful for our instruction, he expresses himself, not in the set phrase of measured declamation, but with the unstudied energy of colloquial discussion; his consequences often flowing with such rapidity from his principles, that the most acute reasoner may find himself at a loss to follow them. It is true, that, to the unassisted and unprepared student, this is frequently matter of infinite embarrassment; for, while yet at a loss with respect to the meaning of the first proposition, he stumbles upon a second, and another, and then another, each more difficult than the preceding. But what does all this amount to? I answer, "that Lord Coke wrote for lawyers, and not for unassisted and unprepared students!" If, in truth, there is any fault to be found, it is simply in the want of intelligence in the reader. *Singulæ paginæ, quid paginæ? Singulæ lineæ dogmata, consilia, monita sunt, sed brevia, sæpe aut occulta, et opus sagaci quâdam mente ad assequendum. Scaber tamen quibusdam et obscurus videtur. Suone vitio an ipsorum? Nam acuté argutéque scripsisse fateor, et tales esse debere qui eum legent*[s].

Again, with respect to the third and last difficulty. In contemplating the zeal, labour, and erudition which have been so meritoriously and successfully displayed by the very learned Editors [Messrs. Hargrave and Butler,] in illuminating this unrivalled and splendid monument of national instruction, it is impossible to with-hold from them the just tribute of our veneration and gratitude. In the present instance, I presume that they have overlooked the inferior and more minute concern of correcting the misreadings in question, as matter of too little importance to be suffered to interfere with their grand and principal design "of supplying the desired annotations."

[s] Justus Lipsius, Pref. ad Tacitum.

Such, however, it must be owned, is the nature of these, that although no longer difficult when they come to be pointed out and explained by some experienced reader; yet, to the unassisted and unprepared student, who sees them, undistinguished as they are by any note, comment, or remark whatever, they are necessarily a heart-breaking and insurmountable stumbling-block.

As, for example: what can be the meaning of the words—" where it is hard to try," &c. in the section following?

" Also, if a villein sueth an action of trespass, or any other action, against his lord, in one county, and the lord saith, that he shall not be answered, because he is his villein regardant to his manor in another county; and the plaintiff saith that he is free, and of a free estate, and not a villein, this shall be tried in the county where the villein hath conceived his action, and not in the county where the manor is: and this is in favour of liberty. And for this cause a statute was made, anno 9 R. II. c. 2. the tenor whereof followeth in this form:—' Also for that where many villeins and fiefs, as well of great lords as of other men, as well of spiritual as temporal, fly and go into cities, towns, and places franchised, as into the city of London, and other like places, and feign divers suits against their lords, because they would make themselves free by the answer of their lords, it is recorded and assented, that lords, nor others, shall not be forebarred of their villeins, by reason of their answer in law.' By force of which statute, if any villein will sue any manner of action to his own use, *in any county where it is hard to try against his lord,* the lord may choose whether he will plead that the plaintiff is his villein, or make protestation that the plaintiff is his villein, and plead the

ther matter in bar. And if they be at issue," &c. See Littleton, s. 193.

Now this section is to be thus explained: while tenure in villenage subsisted, it was not unusual for villeins to set up feigned actions against their lords, for the purpose of obtaining their enfranchisement; for, since the lord was not liable to be sued by his villein, in a civil action, the very circumstance of his pleading thereto, was, by implication, an admission that the plaintiff was not his villein. At the same time it was a general rule of law, (for the law always favours liberty,) that the plaintiff might bring his action in any other county he pleased, instead of confining himself to that in which the manor lay, to which he was regardant as a villein. But this rule gave rise to a manifest inconvenience; for, if the villein brought his action in some distant county, where the enfranchisement of villeins was particularly favoured, and consequently where he had the advantage of, and was strong in trial against his lord, then if the lord took issue upon the question of villenage, it would be decided against him; and if, on the other hand, he pleaded to the special matter upon which the feigned action was brought, he necessarily admitted the enfranchisement of his villein by implication; so that, in either case, he lost his property in the villein. "For this cause," says Littleton, "it was enacted by the statute 2 Rich. II. that no advantage should be had of these feigned actions, but that the vassalage of the plaintiff should be still saved to the defendant, upon his protesting by force of the above statute, "that the plaintiff is his villein," and then pleading the special matter in bar." The reader will observe, that the words mistaken in the original are, "where it is hard to try against his lord," instead of, "where he," the villein, "is powerful or strong in trial against his

lord;" *où il est fort à trier envers son seigneur.* It is almost needless to remark, that this section explains the doctrine of pleading with a "*protestando,*" and which Lord Coke, therefore, accurately defines to be *the exclusion* of *a conclusion.*

Again; let us take the following section, which is, plainly, contradictory and unintelligible, according to the present reading.

"Another matter they allege for a proof, that, before the statute King Edward III. made the 34th year of his reign, by which statute non-claim is ousted, &c. the law was such, that if a fine was levied of certain lands or tenements, if any that was a stranger to the fine, had right to have and recover the same lands or tenements, if he came not and made his claim thereof within a year and a day next after the fine levied, he shall be bound for ever;" *quia dicebatur quod finis finem litibus imponebat.* And that the law was such, is proved by the statute of Westm. 2. *de donis conditionalibus,* where it is spoken, if the fine be levied of tenements given in the tail, &c. *quod finis ipso jure sit nullus, nec habeant hæredes aut illi ad quos spectat reversio, (licet plenæ ætatis fuerint in Angliâ et extrà prisonam,) necessitatem apponere clameum suum.* So it is proved, &c. See Littleton, s. 441.

Now, in the first place, it is not intended to prove, that before the statute 34 Ed. III. the stranger to a fine, who made not his claim within a year and a day, was for ever barred, &c.; but, on the contrary, that if such stranger was out of the realm, at the time of the fine levied, &c. he was not barred, though he made not his claim, &c. And, secondly, as the law is here stated, in the preceding part of the section, it is not proved by the

words of the statute, *de donis*, &c. but the very reverse is proved. In order, then, to restore this section, as we may presume it to have been originally written by Littleton, I should read as follows:—"Another matter they allege for proof, (of the allegation contained in the sect. 440. that a disseisin and descent shall not bind the disseisee, who is out of the realm at the time, &c.) viz. that before the statute of King Edward III. made the 34th year of his reign, (by which statute non-claim is ousted, &c.) the law was such, that if a fine was levied of certain lands or tenements, if any that was a stranger to the fine, had right to have and recover the same lands and tenements, if he came not and made his claim thereof within a year and a day next after the fine levied, he was for ever barred;" *quia dicebatur quod finis finem litibus imponebat.* "But if he were out of the realm, at the time of the fine levied, &c. or in prison, or not of full age, he was not barred, although he made not his claim," &c. And that the law was such, is proved by the statute of West. 2. *de donis*, &c.

In the section 447. it is said, that "in releases of all the right which a man hath in certain lands, &c. it behoveth him to whom the release is made, in any case, that he hath the freehold in the lands, in deed or in law, at the time of the release made." But how comes it, then, (as we read in the section 449.) that "in some cases of releases of all the right, albeit that he to whom the release is made, hath nothing in the freehold in deed, nor in law, yet the release is good?" As for example: suppose A. disseises B. and then leases to D. for life, and afterwards B. releases to A.; or, in the event of the death of B. suppose C. being the heir of B. releases to A.; this is a good release *per mitter and vester le droit* of the disseisee, and yet the releasee had nothing in the freehold.

The present difficulty is occasioned by the wrong translation of the word "*aucun.*" *Aucun s'emploie dans le style marotique, et du palais, pour quelque, quelqu'un.* We ought, therefore, to read as follows: " It behoveth him to whom the release is made, in some cases, that he hath the freehold, &c. For in every case," &c. There is another example of the same word wrong translated, (in the section 540.) where it is said, reserve unto him " no" new service, instead of " any" or " some" new service (19).

In the section 407. the words *esteant l'enfans deins age,* are translated—" being an infant within age," which makes the reference to the heir of the alienee, instead of " the infant being within age," which applies to the disseisor who made the alienation.

Again, in the words, *encontre touts gents,* are translated, " against all nations," instead of " against all persons." Sect. 88. And again, we read of usages after the

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(19) A knowledge of the French language, is no unnecessary part of the education of the law-student, if only to enable him to understand the numberless words of French derivation with which our law-books abound, and which are sometimes strangely mistaken. Thus it is said "and on the other side it should be *arrected* great folly in her to be ignorant of her own title." Co. Litt. 173. b. Upon which we find the following note. " This word *arrected,* which is so uncommon that I cannot find it noticed in any dictionary I have seen, is apparently used for *reckoned.* Lord Coke seems to borrow it from Littleton's use of the word *rette,* at the beginning of the section here commented upon. See note 39. to Co. Litt. 173. b. 16th. edit. But, with all due deference, I presume, that the word *arrected* was formed from the French *arrêté,* adjudged; and *il serra rette* to have been used for *il sera arrêté,* it shall be adjudged.

same time, and continuance after the limitation, &c. instead of from the same time, and from the limitation, &c. *puis le dit tems*, and *puis le dit limitation*, &c. S. 170.

In the section 195. we have a wrong translation of the word "maintenant," which does not mean "by and by," but without delay, presently, forthwith. "And he shall shew his matter forthwith, how he is his villein," &c. The same word occurs in the section 127. and is there rightly translated.

In the section 228. instead of, "because the grantee *had* nothing," &c. which makes the passage obscure and unintelligible, we should read, "because the grantee '*hath*' nothing in the reversion of the land;" *per ceo que le grantee n'ad rien en le reversion del terra, &c.*

In the section 305. it is said, "if a joint estate be made to the husband and wife, and of a third person," &c. instead of, "to the husband and wife and to a third person," &c.; *à le baron et sa femme, et à la tierce personne.*

In the section 311. instead of, "because they have not but one joint title," we should read, "because they have but one joint title;" *per ceo que ils n'ont forsque un joint title.*

In the section 313. the true reading is, "and for these causes, before partition between them, they shall have one assise, and not, 'an assise'." For the question is, not of the assise, but whether or not they shall have *one* or *two* assises. In the same manner, again, in the section 316. we should read, "the tenants in common shall have *one* action of debt against the lessee, and not divers actions," &c.

In the section 353. instead of, "and if such feoffee will not take such estate," &c. we should read, "and if such feoffee will not *make* such estate," &c.; viz. to those who ought to have the estate by force of the condition.

In the section 354. we should read, "upon condition that the feoffee shall re-infeoff," &c. and not "upon condition that 'if' the feoffee shall re-infeoff," which is unintelligible.

In the section 381. we should read, "but in *his* count he shall declare," &c. and not "but in *this* count," &c.; for no mention has been yet made of any count.

In the section 382. the words "for years" are an interpolation, and involve a contradiction in terms. *Si un abbé fait un lease à un homme à aver et tener à luy durant le temps que le lessor est abbé, en cest cas, le lessee ad estate pur terme de sa vie demesne.* In this case the lessee hath an estate for term of his own life; but this is upon condition, &c.

In the section 515. we should read, "know all men, &c. that I, A. of B. have ratified, approved, and confirmed to C. of D. the estate and possession which he hath of and in," &c. and not "which I have of and in," &c. And so, again, in the Latin words, we should read, "*quos habet*" &c. and not "*quos habeo.*"

In the section 559. it is said, "and after the lord grant *his* services to the wife and his heirs," &c. instead of "*the* services to the wife and *her* heirs; *et puis le seignior granta les services à la femme et ses heires.*

In the section 579. we read, "the lord may not dis-

train," for "the grantee may not," &c.; and, "the lord shall have the wardship," for "the grantee shall have," &c.; and, "the lord shall have the tenancy," for "the the grantee shall have," &c.

In the section 601. I would read, "and this warranty descend *upon* his issue," and not "descend *to* his issue." The distinction is, between a warranty which descends as a beneficium *to* the heir, and a warranty which descends as an onus *upon* the heir[t]. We have also to make the same correction in the sections 602. 603. 718. 736. and 739.

In the section 629. we should read, "the reversion in fee simple, which the grantee had by the grant," &c. and not "which the grantor had;" for the grantor was, in this case, the tenant in tail himself.

In the section 639. we should read, "because the grantor had nothing, at the time of the grant, in the right of the wife," &c. and not in the right of "his" wife; for it is not the husband who is here spoken of, but the heir of the husband.

In the section 641. we should read, "discontinue a tail," &c. for "discontinue a deed," &c. And note, that matter in fact means no more than what is elsewhere called matter in deed[u], or matter in pais[x], in contradistinction to matter of record.

In the section 660. the words, "*for* although such

t See the sections 716. 735. 738. And see Co. Litt. 329. a. 376. a. where this distinction is very clearly marked.

u Co. Litt. 260. a.

x Co. Litt. 114 a 251. a. b.

heir," &c. would have been more accurately written, "*and* although such heir," &c. for this is rather an amplification than a conclusion.

In the section 682. instead of the word "escheated," we should read, "eschewed." Littleton says, "*un frank tenement en le ley est escheate et jecté sur luy.*" A freehold in law is eschewed (fallen to) and cast upon him, &c (20).

In the section 719. for "unless the brother dieth without issue male," we should read, "if the brother dieth," &c.; for it is only in the event of the brother's dying without issue male, that the heir female can have any claim at all.

In the section 742. where it is said, "and dieth without issue," I should read, "and *the ancestor* dieth without issue"; for it is not the discontinuee, who is here spoken of, nor the feoffee who hath the estate upon condition, but the collateral ancestor of the tenant in tail, who made the warranty.

In the section 744. we should read, "but if the feoffee had made an estate to *the* uncle, (meaning the uncle of the tenant in tail mentioned in the preceding section,) and not "to *his* (the feoffee's) uncle." And so again in the section 748. we should read, "if after the feoffee, by his deed, release to *the* uncle," and not "to *his* uncle."

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(20) Eschewed (devolved, or fallen to,) comes from the French *échu;* or, as it was anciently written *eschu.* See the *Dictionaire de l'Academie;* article, *échoir.* But the word "escheated" can only apply to the lord of the fee, and to no other.

Again, in the sections 35. and 36. we read "heir in special tail," instead of "tenant in special tail;" in the section 96. we read, "commons," for "commissioners;" in the section 135. we read, "heirs," for "ancestors," and so forth.

And here, by the way, it may not be improper to remark, before we proceed to notice the same sort of errors in the Commentary, that after the section 35. in Littleton, we ought to read the section 52. which is a continuation of the same doctrine, and is evidently misplaced where it now stands. Again, the five sections 304, 305, 306, 307, and 308. belong more properly to the chapter on releases. Again, after the section 334. we should read the section 337. which continues and explains the same doctrine. And, lastly, the concluding part of the section 634. beginning with these words, "and also the heir of the husband," &c. should be read after the preceding section, 633. and not where it now stands.

Again, we read in the Commentary, "that if the father maketh a lease for years, and the lessee entereth and dieth, the eldest son dieth during the term, before entry or receipt of rent, the younger son of the half-blood shall not inherit, but the sister; because," &c. Co. Litt. 15. a. The true reading is, "if the father makes a lease for years, and the lessee enters, and then the father who made the lease dies, and afterwards the eldest son dies during the term, before entry or receipt of rent, the younger son of the half-blood shall not inherit, but the sister; because," &c.

Again, it is said, "if a man grant a rent-charge to a man and his heirs, and dieth, and his wife bring a writ of dower against the heir, the heir, in bar of her dower,

claims the same to be an annuity, and no rent-charge; yet the wife shall recover," &c. Co. Litt. 144. b. The true reading is, " if a man grant a rent-charge to a man and his heirs, and *the grantee of the rent-charge* dieth, and *his* wife bring a writ of dower against the heir, and the heir, in bar of her dower, claims the same to be an annuity, and no rent-charge; yet the wife shall recover," &c.

Again, let us take the three following sentences, by way of specimen, of the obscurity arising from mere defective punctuation.

1. If a lease be made to A. for the life of B. the remainder to C. in fee, A. dieth before an occupant entereth, here is a remainder without a particular estate, &c. Co. Litt. 298. a.

2. For he that is privy and immediately tenant to the lord must attorn; and that is in this case: the tenant for life, and so of the other side if a seigniory be granted to one for life, the remainder to another in fee, the attornment to the tenant for life, is an attornment to the remainder also. Co. Litt. 312. b.

3. And albeit a particular estate be made of lands by deed, yet may it be surrendered without deed, in respect of the nature and quality of the thing demised, because the particular estate might have been made without deed; and so on the other side. If a man be tenant by the curtesy, &c. Co. Litt. 338. a.

Of these the true reading is as follows:—

1. If a lease be made to A. for the life of B. the re-

mainder to C. in fee, and A. dieth; before an occupant entereth, here is a remainder without a particular estate, &c.

2. For he that is privy and immediately tenant to the lord must attorn; and that is, in this case, the tenant for life. And so on the other side, if a seignory be granted to one for life, &c.

3. And albeit a particular estate be made of lands by deed, yet may it be surrendered without deed, in respect of the nature and quality of the thing demised; because the particular estate might have been made without deed. And so on the other side, if a man be tenant by the curtesy, &c.

Again we read "*tenere de se*," for "*tenere de domino feodi*." Co. Litt. 1. a.

And "*aliis in feodo*," for "*alius in feodo*." Co. Litt. 1. b.

And "*mortui sæculo*," for "*mortuis sæculo*". Co. Litt. 3. b.

And "*coterelli* are mere cottages," for "cottagers." Co. Litt. 5. b.

And "because there is no more than 12," for "because there are more than 12." Co. Litt. 6. b.

Again, it is said, "if the father maketh a lease for years, and the lessee entereth and dieth, the eldest son dieth during the term before entry or receipt of rent, the younger son of the half-blood shall not inherit, but the

sister; because," &c. Co. Litt. 15. a. Of this the true reading is as follows: "if the father makes a lease for years, and the lessee enters, and then *the father who made the lease dies*, and afterwards the eldest son dies during the term, before entry or receipt of rent, the younger son of the half-blood shall not inherit, but the sister; because," &c.

Again, we read, "descent," for "disseisin." Co. Litt. 30. a.

And "three or more years," for "three or four years." Co. Litt. 45. a.

And "the law," for "the lord." Co. Litt. 127. a.

Again, we read, "also of such a rent as may be granted without a deed of writ of annuity doth not lie," &c. Co. Litt 145. a. Of this the true reading is, "also of such a rent as may be granted without deed, a writ of annuity doth not lie," &c.

Again, we read, "his election," for "my election." Co. Litt. 145. a.

And "if he which hath the rent dieth, the survivor shall distrain," &c. for "if he who hath *the distress* dieth, the survivor shall distrain," &c. Co. Litt. 147. b.

And "the lessees enter," for "the lessee enters." Co. Litt. 174. a.

And "he that recovereth," for "he that recovered," (meaning the joint tenant who was first summoned and severed.) Co. Litt. 188. a.

And "the feoffor," for "the lessor;" and, again, "the lessor," for "the lessee." Co. Litt. 203. a. And "the grantee," for "the grantor be unjustly disturbed," &c. Co. Litt. 204. a.

And "the conusee," for "the conusor." Co. Litt. 206. a.

And "the feoffee," for "the feoffor shall retain the land," &c. Co. Litt. 218. b.

And "die without heir," for "die without issue." Co. Litt. 241. b.

And "any estate or freehold," for "any estate *of* freehold." Co. Litt. 242. a.

And "so it is not an intrusion," for "so it is *of* an intrusion." Co. Litt. 243. a.

And "plaintiff or defendant," for "plaintiff or demandant." Co. Litt. 257. a.

And "*á minori ad majus*," for "*á majori ad minus*." Co. Litt. 260. a. The argument, in this case, is as follows: "if a recovery, which is matter of record, shall not bind those who are in prison, by reason of their default for want of answer, &c. *à fortiori*, they shall not be bound by a descent which is only matter of deed, and not of record;" *quod in majori non valet, non valebit in minori.*

Again, we read, "an annuity that the person ought to pay," for "an annuity that the *parson* ought to pay." Co. Litt. 266. a.

And "the disseisor," for "the disseisee." Co. Litt. 277. a.

And "the disseisec," for "the disseisor." Co. Litt. 277. b.

Again, we read, "if the plaintiff, in a personal action, recovers any debt, &c. or damages, and is outlawed after judgment," &c. Co. Litt. 288. b. Of this the true reading is, "if the plaintiff, in a personal action, recovers any debt, &c. or damages, and *the defendant* is outlawed after judgment," &c. (for it would be absurd to suppose the plaintiff to be outlawed upon his own suit.)

Again, we read, "releases," for "leases." Co. Litt. 290. b.

And "the heir of the disseisor," for "the heir *or* the disseisor. Co. Litt. 298. b.

And "because the state of the land was in *him*," instead of "because the state of the land was in *them*," (meaning the feoffees, and not the *cestui que* use here spoken of.) Co. Litt. 302. b.

And "for by the release of the seigniory, rent-charge or common are extinct." Co. Litt. 305. a. Of this the true reading is, "for by the release, the seigniory rent-charge or common is extinct."

And "no service of another cannot be reserved," &c. for "no service of another nature can be reserved," &c. Co. Litt. 305. a.

Again, where the words are, "they in the remainder ought to have acquittal." Co. Litt. 312. b. The true reading is, "the tenant to the attornment ought to have acquittal."

Again, we read, "release, harriot, or the like," for "relief, heriot, or the like." Co. Litt. 314. a.

And "without warranty," for "with warranty." Co. Litt. 326. b.

And "attornment of the lessee for years, of a release," &c. for "attornment of the lessee for years, to a release," &c. Co. Litt. 330. b.

And "*si pars rea accipiat de plenitudine,*" *&c.* for "*si pars rea excipiat de plenitudine,*" *&c.* (if the defendant plead in abatement that the church is full, &c.) Co. Litt. 344. b.

And "a new writ of entry," for "a new right of entry." Co. Litt. 349. a.

And "*suum tenementum in possessione,*" for "*suum tenentem in possessione,*" his tenant in possession, and not his tenement.) Co. Litt. 383. b.

And "he to whom it was made had nothing in the land," &c. for "he who made it had nothing in the land," &c. (meaning the vouchee himself, who made the confirmation with warranty.) Co. Litt. 385. a.

Et cætera ejusdem generis! Upon all which it may be remarked in the words of one of our poets:—

> The invention all admire, and each that he
> Was not himself the inventor; so easy is found
> Once found, what yet unfound, most would have thought impossible.

And now, having shewn the nature of the difficulties

to be surmounted in this course of study, I shall proceed to the next point to be considered, and which will constitute the third part of our present Inquiry; "the endeavour to illustrate by example, the method of surmounting them." The explanation of the legal theorems which follow, are, therefore, submitted to the perusal of the studious reader for this single purpose. I do not pretend that they offer any thing new or interesting to lawyers, but I presume, with submission, that they will fully suffice to enable the hitherto unassisted and unprepared student to judge for himself of the sort of professional tuition he stands in need of, *in order to make himself master of the Institute.* Seneca gives us a piece of admirable advice upon the study of ethics in general, which applies most forcibly to this distinct branch of them in particular. He recommends it to us, in the first place, to ascertain the object of our studies; secondly, to determine upon the plan; and thirdly, to look out for some intelligent professional Instructor to assist us in the prosecution of it. For it is of the greatest importance, (he observes,) that we should not follow the common herd, like cattle, preferring what it is the fashion to do, to that which we ought to do. This acquiesence, without judgment, in the practice of "the many," perpetuates among us the most pernicious errors (21).

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(21) Decernatur primùm et quò tendamus, et quà; non sine perito aliquo, cui jam explorata sint ea, in quæ procedimus. Nihil enim magis præstandum quàm ne pecorum ritu sequamur antecedentium gregem, pergentes non quà eundum est, sed quà itur. Dum unusquisque mavult credere quam judicare, versat nos et præcipitat traditus per manus error.

ON

THE SCIENCE OF THE LAW,

&c. &c.

PART III.

Of the Method of illustrating the Institute, &c. &c.

I HAVE endeavoured, in the two preceeding divisions of this Inquiry, to shew how totally inadequate is the system "of copying precedents in an office," and "of reading and common-placing Blackstone's Commentaries," in order to educate and form the student to be a lawyer; and, secondly, to point out the merits of that far better plan, recommended by an eminent and learned judge, of bending our whole mind and application to the study of "the Institute." The difficulties attending the prosecution of this course of study, have been also fairly stated, as well as the nature of the information to be derived from it. And now, to explain and endeavour to illustrate, by example, the method of reading and expounding the doctrines in question, which at the same time that it will serve to get rid of every difficulty, will ensure the desired attainment *of the advantages of a law-education grounded on the learning of the Institute*, is the next point to be considered. "For, in a case of this kind," says Lord Coke[a], "it is not sufficient to tell one generally, what he

[a] Co. Litt. 152. a.

should do, but to direct him how and in what manner he should do it." I should hope too, that no such assistance to the student having been hitherto supplied, (at least to my knowledge,) by any other gentleman of the profession, I may venture, without the risk of incurring the imputation of extraordinary presumption, to give publicity to the following humble specimen of my present labours. At all events, the path will be left still open; and it is not improbable, that even what is here suggested, may be the means of inducing others more equal to the task, and of more tried experience, to afford us the benefit of their better counsel and direction. The argument is for instruction, and not for victory :—*benigne lector, utere tuo judicio, nihil enim impedio.*

Let us begin, then, with the following extract from the first chapter of the first book of Releases[b]. And here it is to be observed, that, within the compass of only half a page, we have no less than eight distinct legal theorems; which may serve as a sort of specimen to bring the reader acquainted with the abridged and compendious character of the learning of the Institute in general.

For example:—"If the obligee make the obligor his executor, this is a release in law of the action, but the duty remains, for the which the executor may retain so much of the goods of the testator.

"If the femme obligee take the obligor to husband, this is a release in law. The like law is, if there be two femmes obligees, and the one take the debtor to husband.

"If an infant of the age of seventeen years release a

b Co. Litt. 264. b.

debt, this is void. But if an infant make the debtor his executor, this is a good release in law of the action.

" But if a femme executrix take the debtor to husband, this is no release in law; for that should be a wrong to the dead, and in law work a devastavit, which an act in law shall never work. And so it was adjudged in the King's Bench, Mich. 30 and 31 Eliz. in which case I was of counsel.

" But, it is to be observed, that there is a diversity between a release in deed, and a release in law: for, if the heir of the disseisor make a lease for life, and the disseisee release his right to the lessee for his life, his right is gone for ever. But if the disseisee doth disseise the heir of the disseisor, and make a lease for life, by this release in law the right is released but during the life of the lessee: for, a release in law shall be expounded more favourably, according to the intent and meaning of the parties, than a release in deed, which is the act of the party, and shall be taken most strongly against himself; and so in the case aforesaid, where the debtor is made executor."

Now the way in which I would endeavour to explain the foregoing theorems is, according to the subjoined reading:—

1. If the obligor make the obligee his executor, (for this was what Lord Coke intended, as fully appears by the concluding sentence, " for the which he may retain," &c. and not as it stands in the present reading,) I say, then, if the obligor make the obligee his executor, and the latter accepts the executorship, it is in law a release of the action. Why? Because the creditor, by becoming

the executor of his debtor, has put himself in the situation to have no one to bring his action against but himself; *quod esset absurdum.* But, notwithstanding he has thus by implication released the action, this does not extinguish the original debt or duty, which remains still unsatisfied; and because the law never works a wrong or injury to any man (1), he is therefore allowed to retain to the amount of the debt, out of the personal estate of the testator, which he has in his hands, in the same manner as if he had sued for and recovered it against any other executor (2). And, therefore, if the obligor (3), &c.

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(1) Legis constructio non facit injuriam; et jus respicit æquitatem. Co. Litt. 24. b. 183. a.

(2) *In the same manner as if he had sued for and recovered it against any other executor;* that is to say, without prejudice to creditors of a higher degree. For where the assets are not sufficient to cover all the debts, the executor must first satisfy the judgments and specialties, before he discharges the simple-contract debts. At the same time it is to be observed, that the doctrine of the priority or preference of debts, is only in the case of "legal," and not of "equitable" assets. For, in the latter case, *æqualitas est æquitas.* Thus, for instance, if lands are devised to trustees for payment of debts, debts by simple contract and by specialty shall be paid in proportion; and, though the trustees are creditors to the testator, or sureties for him, they shall not be allowed to prefer themselves. 2 Chan. Cas. 54. But if lands are devised to an executor, they become "legal" assets, and the debts shall be paid in a course of administration, according to the precedency and priority at law. Ventr. 63. 2 Ch. Rep. 262. 2 Ch. Cas. 248. Hob. 265. So that if the assets are legal, they must be administered in a regular course, according to the degree of the debt; but if equitable only, all debts, of whatever degree, are to be paid equally.

(3) If the debtor is made executor, it is a release, in law, of the action, (for the same reason,) and *only that;* for the debt re-

2. Suppose A. being indebted to B. (a woman,) in a bond of 500*l.* they afterwards intermarry; it is a release in law to the husband, both of the action and of the debt. In the first place, it is a release of the action, because the husband and wife are, in the eye of the law, but one person; neither can she bring any action without his concurrence, and in his name as well as her own. Secondly, it is a release also of the debt, because the act of marriage is a gift, in law, to the husband, of all the wife's personal property, whether in possession or in action (4). And, therefore, if the femme obligee, &c.

3. Suppose A. being indebted to B. and C. (two wo-

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mains unextinguished, and will be held to be assets. Thus, where a testator left his father and nephew (who owed him 500*l.* each,) his executors, and named no residuary legatee, it was held that this was a trust for the next of kin; the appointment of a debtor executor being, in effect, no more than parting with the action. See Carey *v.* Gooding. Trin. 30 G. 3.

(4) Things in action, as debts due to the wife by bond, &c. which are to be demanded by action, are only so far vested in the husband, by the act of marriage, that he may reduce them into possession when he will; for, if he dies in the lifetime of the wife, without having made this alteration, they shall survive to her. And so, on the other hand, upon the death of the wife, in the life-time of the husband, they shall not survive to him, as things in possession, nor shall he have any right to them, but only as her administrator, the statute of distributions (stat. 22 & 23 C. 2.) not extending to the estates of *femmes covertes.* But, in the case now under consideration, as the husband cannot bring the action against himself, *quod esset absurdum,* he is, therefore, considered, in the eye of the law, to be in the same condition, as if he had really done so, and thus reduced the debt into possession.

men,) in a bond of 500*l.* intermarries with B.; it is a release, in law, of the whole debt. Why? Because where two join in a bill or bond, they hold themselves out to the world as partners, as far as relates to that transaction, and are, therefore, to be treated as such. Accordingly, payment to one is payment to both; and the acquittal or release of the one, may pleaded against the other; for a release and acquittal are in effect the same thing. And as it is of an express release, which is called a release in deed, so it is of an implied release, which is called a release in law, and such is in this case the marriage. And, therefore, the like law, &c.

4. If an infant, of the age of seventeen years, release a debt, it is a void release and of no effect; for the law so far favours infants, as not to permit them to do any act that may by possibility turn out to be of injury or damage to them. But, if an infant of the age of seventeen years, make his debtor his executor and die, it is a good release, not only of the action, for the reasons already stated in the foregoing propositions, but likewise of the debt itself, by way of gift or legacy (5). For, since an infant of the age of seventeen years is allowed in law to appoint[c] an

c See the note 83, to Co. Litt. 89. b.

(5) It was formerly a settled notion, that where no residuary legatee was appointed by the will, the undevised surplus of the testator's personal property, devolved to the executor's own use, by virtue of his executorship. Perk. 525. The law, however, is now so far changed, in this respect, that, where there is sufficient upon the face of the will, by means of a competent legacy, or otherwise, to presume that the testator did not intend his executor should have the residuum or undevised surplus, it will be held to be a trust, in his hands, for the next of kin.

executor, it is but reasonable that he should be allowed, at the same age, to bequeath, according to his discretion, the personal property which is to be administered by the executor. And he cannot exercise this right to his own prejudice or damage; the question of property, in this case, being no longer between him and the legatee or grantee, but between the executor and the next of kin, whether the one or the other of these shall be benefited by the disposal of the infant's personal property after his decease. And, therefore, if an infant, &c.

5. If A. having a bond against B. makes C. (a woman,) his executrix, and dies, and afterwards B. and C. intermarry; this is a suspension of the action during the coverture, for the reasons above stated; but it is no release of the debt from the wife to the husband; for the executrix has no more than a qualified or trust property in the effects of the testator, subject to all his debts, legacies, and the like. And, therefore, if a femme executrix, &c.

6. A. was disseised by B. who, after five years' peaceable possession, (as required by the statute 32 H. VIII. c. 33.) (6) died seised, and the land descended to his heir C. In this case A.'s entry was taken away by the descent,

(6) The statute 32 H. 8. c. 33. enacts, that if any person disseises or turns another out of possession, no descent to the heir of the disseisor shall take away the entry of him that hath the right to the land, unless the disseisor had five years' peaceable possession next after the disseisin. This, however, does not extend to any feoffee or donee of the disseisor, mediate or immediate. See Co. Litt. 238. a.

and turned to a droit[d]. Afterwards, C. made a lease for life to D.; and afterwards, A. the original disseisee, released to D. Now A.'s right is thereupon extinguished, and gone for ever; for, this being the release of a droit, and being also made to the tenant of the freehold[e], is a good release, and shall enure *per extinguisher le droit* of A. for the benefit, not only of D. the releasee, but of C. the heir of the disseisor, likewise. For the life-estate of D. and the reversion of C. expectant thereon, constitute but one fee; and then it is a principle of law, that where a release is made to one who has a particular estate or portion of a fee, it shall enure equally to the benefit of all who have the remaining or corresponding portions of the same fee. And, therefore, if the heir of the disseisor, &c.

7. A. was disseised by B. who, after five years' peaceable possession, died seised, and the land descended to his heir C. and afterwards A. entered upon C. (which he had no right to do, because his entry was taken away by the descent, and therefore such entry was a disseisin,) and made a lease for life to K. and afterwards C. recovered against K. in ejectment. The question then arises, whether C. shall have advantage of the implied release, granted *inclusivè* in the lease from A. to K. according to the doctrine laid down in the foregoing proposition?—Now, in this case, C. shall have no such advantage; and that for the following reasons: 1st. Because the release in question was but an adjunct to K.'s particular estate, which is determined; *et subblato principali tollitur adjunctum.* 2dly. Because the corresponding portion of the fee, that is to say the reversion expectant upon K.'s

d See the note 155. to Co. Litt. 239. a.

e See Litt. sect. 447.

life-estate was assumed to be in A. himself, when he made K. his particular tenant; according to the maxim, both of law and of common sense, *omnis privatio præsupponit habitum.* And, thirdly, because the rules of legal strictness, which are always to be observed in the construction of releases *in deed*, (to prevent men from affecting ambiguous or loose expressions, which they might be inclined to do, if afterwards at liberty to put their own construction upon them,) do not apply to implied releases, or releases *in law*, which are, therefore, to be more liberally interpreted, and in favour of the parties; *quia lex nemini facit injuriam.* And, therefore, if the heir of the disseisor, &c.

8. And so in the case aforesaid, (No. 4.) where the infant makes an express release, it is void; but, where the release is implied in law, as in the case of his making his debtor his executor, it receives a more favourable interpretation, and is held to be a good release.

Again; "R. brought an *ejectione firmæ* against E. for ejecting him out of the manor of D., which he held for a term of years of the demise of C.—E. the defendant, pleaded that B. gave the said manor to P. and Katherine his wife, in tail, who had issue E. the defendant, and after the donees infeoffed C. of the manor, upon condition that he should demise the manor for years to R. the plaintiff, the remainder to the husband and the wife, &c. C. did demise the land to R. the plaintiff for years, but kept the reversion to himself. Wherefore, Katherine, after the decease of her husband, entered upon the plaintiff, &c. for the condition broken, and died, after whose decease the land descended to E. the issue in tail, &c. now defendant; judgment *si action.* Exception was taken against this plea, because E. the defendant, main-

tained his entry by force of a condition broken, and shewed forth no deed; and the plea was ruled to be good, because the thing was executed, and, therefore, he need not shew forth the deed. Note; the defendant being issue in tail, was remitted to the estate-tail." Co. Litt. 266. a.

You have here, I would say, the case of a title by remitter. A. and B. husband and wife, were tenants in tail of certain lands, of which they made a feoffment to D. upon condition "to lease to E. for years, and to limit the remainder to them A. and B." Upon this, D. made the lease to E. for years, but, instead of limiting the remainder to A. and B. he kept the reversion to himself, which was therefore a breach of the condition. A. died. Then B. the widow entered upon E. the lessee, for the condition broken, and died; and then the issue in tail entered; and now, upon an action of ejectment being brought against him by the lessee, for the remainder of his term, he (the issue in tail) sets forth these facts in a special plea in bar, and, thereupon, prays judgment according to the usual form, "if the said plaintiff shall have and maintain his said action thereof against him." To this the plaintiff demurs, and alleges, for cause of the demurrer, that the defendant had pleaded the condition broken, without having produced the deeds to prove it; which is contrary to an established rule in pleading, "that whenever deeds are relied on, they must be regularly produced in court," and that for two reasons; first, that the court may be able to judge, whether there are sufficient words to bear out the construction which has been put upon them; and secondly, that they may be proved by the witnesses, or other proof if necessary, which is matter of fact[f]. But the demurrer was over-ruled, and the plea of

[f] Co. Lit. 121. b.

the defendant was adjudged to be good, because the remitter was taken to be the *gist* or substance of the plea, and not the breach of the condition, which was only narrative and matter of inducement to the defendant's title, and consequently not material; for, he being issue in tail, the estate tail was immediately executed in him by the descent of the freehold; that is to say, from the moment the freehold in law was cast upon him, by the descent, he was instantly remitted to his more ancient droit in tail (7).

Again; let us take the distinction between the entry of a disseisee to make a release to, or to take livery from the disseisor; for, in the latter case, he shall revest his

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(7) The doctrine of remitter, which is always favoured in law, for the sake of quieting the possession, is founded upon this common-sense principle, that the rightful claimant would otherwise have to bring his action against himself, *quod esset absurdum*. Where the law deprives a man of his remedy without his own fault, it places him in the same condition, as if he had lawfully recovered by that remedy. The maxim is, *quod remedio destitutur, ipsâ re valet si culpa absit.* But where the party has no such inherent remedy, or comes to the defeasible title, by his own wrong, or is barred by indenture, &c. he shall there have no advantage of the remitter. Thus, where A. an infant, and B. of full age, being joint-tenants, were disseised by C. who, after peaceable possession during five years, died seised, and the land descended to his heir D. and afterwards (A. being still an infant) D. leased to A. and B. jointly. It was held, that A. had title by remitter, because his entry was not taken away by the descent from C. to D. by reason of his infancy. But B.'s entry not being congeable, he had not the same title, but took under the lease from D. to which he consented, being of full age; and consequently A. and B. are now become tenants in common. Co. Litt. 364. b. And see the note (299) to Co. Litt. 347. b.

ancient estate by his entry, but not so in the former. As, "if it be agreed between the disseisor and disseisee, that the disseisee shall release all his right to the disseisor upon the land, and accordingly the disseisee enter into the land, and deliver the release to the disseisor upon the land, this is a good release, and the entry of the disseisee being for this purpose, did not avoid the disseisin; *for his intent, in this case, did guide his entry to a special purpose.* But, if the disseisor infeoff the disseisee and others, there albeit the disseisee came to take livery; yet, when livery is made, the disseisee is remitted to the whole in judgment of law, as shall be said more at large in the chapter of remitter, in its proper place[g]."

Now, upon what point does this distinction principally turn, or how comes it, that, in the latter case, the entry of the disseisee is not guided *by his intent to a special purpose*, as well as in the former? I answer, because the release is the disseisee's own act, and he has himself determined the construction to be put upon his entry for that purpose; but the livery of seisin is the act of the disseisor, and not the disseisee's own act; for if, in the latter case, there had been a deed indented, and the livery had been made according to the deed, the deed indented being the act of both parties, the disseisee would have been concluded by it, and consequently would not have been remitted. But, in the present instance, the livery which is supposed to be without deed, or by deed poll, being the act of the disseisor alone, the disseisee is not concluded by it; *and when the livery is so made* (to the disseisee and others,) the *disseisee is remitted to the whole* in judgment of law, because his ancient estate was revested in him by his entry, and his entry was lawful upon the whole[h].

g Co. Litt. 49. b.

h Co. Litt. 350. a. 363. b.

Again, it is said, "if an action of waste be brought by baron and femme in remainder in special tail, and hanging the writ, the wife dieth without issue, the writ shall abate, because the action of waste must be *ad exhæredationem*." Co. Litt. 285. a. Or, as Lord Coke has differently worded the same proposition, in another place, "if the estate-tail determine, hanging an action of waste, and the plaintiff becomes tenant in tail after possibility, the action of waste is gone." Co. Litt. 53. b.

Suppose lands are given to husband and wife in frankmarriage, or to them and the heirs of their two bodies, they are tenants in special tail[i], and if they afterwards join in a lease for life, they are tenants in special tail in remainder[k]. If afterwards their lessee commits waste, it is a forfeiture; and now they may either enter for the forfeiture, or bring an action of waste, in which, by the statute of Gloucester, the place wasted shall be recovered together with treble damages. Let us then suppose they bring the action of waste, and afterwards the wife dies before judgment. Now, by the death of the wife without issue, the husband is become tenant in tail after possibility of issue extinct, the which is only a life holder; and, consequently, since the form of the writ of waste is to call upon the tenant to appear and shew cause why he has committed the alleged waste, &c. to *the disherison (ad exhæredationem)* of the plaintiff, it follows that the husband can no longer maintain this action. There evidently can be no damage to *the disherison* of a tenant in tail after possibility, *because he has no inheritance;* and this the defendant may either plead in abatement, or may afterwards move in arrest of judgment.

i Litt. sect. 16, 17. k Co. Litt. 49. a. 143. a.

Again; Lord Coke says, "relief is no service, but an improvement of the services, or an incident to the services, for which the lord may distrain, but cannot have an action of debt; but his executors or administrators may have an action of debt, and cannot distrain[1]."

I should explain this doctrine as follows: "a relief, at the common law is no service, but only an improvement of the service, or an incident to the service;" it was originally in the nature of a fine or composition, which the heir paid to the lord upon taking the land in succession. In the case of tenure by knight's service, the relief amounted to a fourth part of the value of the land; but, since the statute 24 Charles II. for converting military into socage tenures, the value of a common-law relief is universally one year's rent, that being the relief which was used to be paid by socage tenants before the statute, and, consequently, such reliefs can only be now due out of lands which are subject to a rent; for the relief cannot be calculated if an annual rent is not payable. But it is otherwise where the relief is due by express reservation, or by special custom; for, in these cases, the relief may be either more or less, and may be payable where there is no yearly rent. With respect, then, to the relief by the common law, which is here intended, "the lord may distrain for this." Why? Because it is due of common right upon the death of the tenant; and so it is in the case of a relief due by reservation; the remedy by distress follows of course; for, although the relief itself is no service, yet the fealty (to which the relief is incident,) is an inseparable incident to the tenure, and the remedy by distress is an inseparable incident to the

[1] Co. Litt. 83. b.

fealty (8). "But the lord cannot have an action of debt." Why? Because the law has provided him another and more appropriate remedy; for the relief is not payable at all events, as a heriot is, but only in case of taking up the lands in succession; and, therefore, as the land is principally bound in this instance, the law gives the remedy "by distress." "But the executors and administrators may have an action of debt." Why? Because they have no other remedy; for the remedy "by distress," was in respect of the fealty, and the fealty and the relief are now distinct[m]."

Again, under the head of tenant for years, we read as follows: "if two coparceners be, and one of them let her part to another for years, and after, upon a writ of partition brought against the lessor, too little is allotted to the lessor, it is holden by some that the lessee cannot avoid

[m] See Co. Litt. 47. b 146. b. 162. b.

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(8) There is a distinction, in law, between separable and inseparable incidents. As for example: fealty is an inseparable incident to every tenure, except frankalmoigne; for, wherever there is a tenure, the law creates the fealty, in order to oblige the tenant to be faithful and loyal to the lord of whom he holds; but, excepting the fealty, all other services are only separable incidents, and may be severed from the tenure. Co. Litt. 93. a. Again, wherever there is a service, by which lands or tenements are holden, the law gives the remedy by distress, as a necessary incident to it; and, consequently, the remedy by distress is an *inseparable incident* to fealty: but other services, such as to plough, to repair, to attend, and the like, and all rents whatsoever, have the remedy by distress belonging to them, as only a *separable incident*, "because they do not constitute the tenure." Co. Litt. 151. a.

it, for that it is made by the oath of men, and judgment is thereupon given that the partition shall remain firm and stable. But if there be two coparceners of three acres of land, every one of equal value, and the one coparcener letteth her part, and after make partition, and one acre is allotted only to the lessor, the lessee is not bound hereby, but he may enter and take another half-acre, for that of right belongs untó him[n].

Now, the distinction which is here intended to be shewn, is between partition by judgment, in pursuance of the writ *de partitione faciendâ*, and partition without judgment, whether by agreement or otherwise. For, in the former case, notwithstanding the partition may have been unequally made, it shall still be conclusive as to all the parties; because it is part of the judgment "that the partition shall stand good and unavoidable," *ideo consideratum est (per curiam) quod partitio firma et stabilis in perpetuum teneatur*[o]. But where the partition is made without the solemnity of a judgment, it is still open to further inquiry, and, if found to be unequal, may be avoided by *scire facias* in chancery, or by the writ *de partitione faciendâ* at common law[p]. Secondly, it is to be observed, that the lease for years makes no alteration in this respect; for the writ of partition lies against the tenant of the freehold, and the lessee for years is no more than the bailiff or *locum tenens* of the freeholder[q]. Having premised these general distinctions, it is clear that, in the former case, the lessee of the coparcener is concluded by the judgment; but, in the latter case, in which there is no judgment, the lessee may, consequently, enter into the moiety which of right belongs to the lessor; for

n Co. Litt. 46. a.
o Co. Litt. 169. a. And see the note 23.
p Co. Litt. 171. a.
q Co. Litt. 167. a.

the partition is still open to further inquiry (9). The remark which is subjoined to these propositions, may be also usefully remembered, viz. "that it sufficeth not to know what the law is in these cases, unless we also know the reason and cause thereof."

Again; we read, that "a condition in law by force of a statute which gives a recovery, is, in some cases, more strong than a condition in law without a recovery." For if the lessee for life make a lease for years, and after enter into the land and make waste, and the lessor recover in an action of waste, he shall avoid the lease made before the waste done. But if lessee for life make a lease for years, and after enter upon him, and make a feoffment in fee, this forfeiture shall not avoid the lease for years. Nor, in any of the said cases, shall a precedent rent, granted out of the land, be avoided; for if lessee for life grant a rent-charge, and after doth waste, and the lessor recovereth in an action of waste, he shall hold the land charged during the life of tenant for life; but if the rent were granted after the waste done, the lessor shall avoid it. And the reason wherefore the lease for years in the case aforesaid shall be avoided is, because of necessity the action of waste must be brought against the lessee for life, which in that case must bind the lessee for years, or also by the act of the lessee for life, the lessor should be barred to recover *locum vastatum*, which the statute giveth." Co. Litt. 233, b.

Now, the first distinction which is here taken, is that

(9) In the modern practice, a court of equity is the jurisdiction usually resorted to, in order to compel partition.

between the operation of a forfeiture incurred by tenant for life, 1st. upon committing waste, and 2nd. upon making a feoffment, or grant of a larger estate than his own. For, in the former case, a preceding lease for years shall be avoided, but not in the latter. As for example: A. leases to B. for life, who leases to C. for years, and afterwards B. enters and commits waste. If A. recovers in an action of waste, as he may lawfully do, he shall hold the land discharged of the lease for years to C. For the statute of Gloucester, upon which this action is brought, gives the place wasted, (the *locus vastatus*,) which being thus revested in A. by the act and operation of law, it follows that C.'s estate therein is necessarily determined. But otherwise it is if the tenant for life enters and makes a feoffment, which is a forfeiture; for he can but forfeit that which is *his* at the time of the forfeiture, and nothing more; and that was, in this case, the reversion for life, expectant upon the determination of C.'s lease for years, which had been precedently and lawfully derived out of it. By the same rule, then, A. cannot enter for the forfeiture before the determination of the preceding lease for years, any more than B. himself could have done, supposing there had been no forfeiture. Secondly, there is this distinction to be observed, with respect to forfeiture for waste, between a lease and a rent-charge; viz. that the former shall be avoided by the recovery in an action of waste, but the latter shall stand good and be available in law, notwithstanding the recovery; and for which this is the reason, " that although the statute gives the place wasted, it does not displace or defeat any legal charges upon it, which being collateral to the estate in the land, do not interfere with the transmutation of the possession. When the land, therefore, passes upon the forfeiture to the next taker, it passes with all its legal charges and incumbrances; *transit terra cum onere.* But the te-

nant for life cannot create any legal charge upon the land *after* the waste done; for, from that time, the land is no longer *his* to charge, but belongs of right to the reversioner, by force of the statute.

Again, let us take the important doctrine of the "actual" and "fictitious" fee, as contained in the two following sections.

"Note, that an estate tail cannot be discontinued, but there where he that makes the discontinuance was once seised by force of the tail, unless it be by reason of a warranty, &c. As if there be grandfather, father, and son, and the grandfather is tenant in tail, and is disseised by the father, who is his son, and the father makes a feoffment of this without warranty, and die, and afterwards the grandfather dies, the son may well enter upon the feoffee; because this was no discontinuance, in as much as the father was not seised by force of the entail at the time of the feoffment, &c. but was seised in fee by the disseisin of the grandfather."

"Also, if tenant in tail make a lease to another for term of life, and the tenant in tail hath issue and dieth, and the reversion descendeth to his issue, and after the issue granteth the reversion to him descended, to another in fee, and the tenant for life attorn and die, and the grantee of the reversion enter, &c. and is seised in fee in the life of the issue, and after the issue in tail hath issue a son and dieth, it seems that this is no discontinuance to the son, but that the son may enter, &c; for that his father, to whom the reversion of the fee-simple descended, had never any thing in the land by force of the entail, &c." Litt. sect. 637, 638.

Now, I should endeavour to explain these two sections in nearly the following manner:

Suppose A., B., and C. were grandfather, father, and son. A. the grandfather, being tenant in tail, was disseised by B. who afterwards made a feoffment, without warranty, to K. and died, and afterwards A. died without having entered as he might have lawfully done. Quære, is C.'s entry taken away? Certainly not. Because the alienation by B. did not amount to a discontinuance, a discontinuance being the act of tenant in tail, which B. never was (10.) But if the feoffment had been with warranty, it would have been otherwise. Why? Because, in that

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(10) In order to constitute a discontinuance, it is necessary that the grantee should have had seisin "*per* the tenant in tail, in the life of the tenant in tail." A. and B. were lord and tenant in fee simple. B. the tenant, granted to C. in tail, remainder to E. in fee. Afterwards C. made a lease to F. for life, and afterwards granted the reversion to G. in fee. G. died without heir, upon which the reversion escheated to A. Afterwards F. tenant for life, died; and, thereupon, A. entered in right of his escheat, to which he succeeded upon G.'s dying without heir, and afterwards C. the tenant in tail, died. Now it is to be observed that there is no discontinuance here, because no seisin has been transmitted from C. the tenant in tail, to A. the lord; and, therefore, D. the issue in tail, or if he is dead without issue, E. the remainder-man, or his heirs, may enter. But if G. had had seisin in the life-time of C. it would have been otherwise; for that would have been equivalent to a second livery; (see Co. Litt. 333. b.) And so it would have been if C. had granted the reversion to G. at the same time he leased to F. for life; for the livery to F. would then have enured to G. likewise, and passed the reversion as one act. Co. Litt. 33. a. 340. b. And see the note (278) to Co. Litt. 325. a.

case, the warranty would have descended upon C. as the warranty of an ancestor who had at the time an "actual fee," or estate of inheritance in possession in the lands warranted, and, consequently, such warranty (being collateral to the title,) would have been a sufficient bar even without assets (11).

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(11) Warranties are a species of assurance, at the common law, introduced at a very early period of our history, for the sake of quieting the possession of landed property: and, originally, all warranties, other than those commencing by disseisin, were a bar to the heir of the warranting ancestor, from claiming the lands warranted. For it was presumed that no one would wantonly disinherit his next of blood, without leaving him, at the same time, a compensation either in lands or money, of equal value. The several statutes which have been since enacted, in restriction of the operation of warranties, have uniformly proceeded upon the same principle, "that the heir should have assets by descent from the warranting ancestor." The first of these was the statute of Gloucester, (6 Ed. 1. c. 3.) declaring that the warranty of the tenant by the curtesy, should be no bar to the heir claiming the maternal inheritance, "unless assets descended to him from the father." Afterwards it was held, by analogy of construction of this statute, in order to give effect to the statute *de donis*, that the "lineal" warranty of tenant in tail should be no bar to the issue without assets descended. Next came the statute 11 H. 7. c. 20. declaring that the warranty of the tenant in dower shall be no bar to the heir of the husband, though he be also heir to the wife. And, lastly, by the statute 4 & 5 Anne, c. 16. the tenant for life's warranty is declared to be void against the remainder-man and reversioner; and all collateral warranties, by any ancestor, not having an estate of inheritance in possession, against the heir. With the exception, however, of these restrictions, warranties are still in force, are still part of the law of the land, and other than the aforementioned are always a sufficient bar to the heir of the warranting ancestor, even without assets. See the note (328) to Co. Litt. 373. b.

But when the warranty is annexed to what is called the "fictitious fee," it is otherwise. As for example: suppose, again, A., B., and C. were grandfather, father, and son. A. the grandfather, being tenant in tail, leased to G. for life, and died; and, afterwards, B. the issue in tail, granted the reversion to him descended to K. in fee, and G. the tenant for life, attorned to that grant, and afterwards G. died, and thereupon K. entered, and was seised in fee in the life-time of B. the issue in tail; afterwards B. died, leaving issue C. Now, the question is, whether C.'s entry is taken away? Certainly not. Because the estate which K. claims as the grantee of B. was not derived out of the original estate tail, for that was *in abeyance* at the time of the grant, having been discontinued by the lease made by the grandfather to G. for life. Neither was it the reversion of an *actual fee* created by livery of seisin; for the livery of seisin was from A. to G. and only for G.'s life, which is now determined.—K. then can claim no estate but that of the *fictitious* reversion alone, which descended from A. to B. as the remaining or corresponding portion of the entire fee, which A. assumed to have when he made the lease to G. for life; for that was a greater estate than could lawfully be derived out of an estate-tail, and *no particular estate can exist in law, without its remaining or corresponding portion* (12). When A. made the lease to G. for life, he therefore created, at the same time, a reversion to himself in fee simple; upon A.'s death, this reversion descended to his heir B. and, consequently, K. as the grantee of B. can claim nothing more. But, that discontinuance being now ended, by the determination of the lease for G.'s life, the reversion in

(12) See the Appendix, prop. 4. And see Litt. T. 620. And Co. Litt. 297. b. 333. a. 336. b. 338. b.

law which made up the corresponding portion of the entire fee is vanished; and, though B. could not claim against his own grant, which operated by way of estoppel as to him, yet there is nothing to prevent C. the issue, from entering after the death of B. and the estate-tail will be thereupon revested in him as before the discontinuance (13). We may add, that if a warranty had been annexed to the conveyance from B. to K. it would have been void and of no effect as against C.; for, the fictitious fee being vanished by the determination of the discontinuance which created that fee, the warranty annexed to it falls to the ground. *Sublato principali tollitur adjunctum* (14).

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(13) The "fictitious fee" is therefore so called, because, in point of fact, it exists no otherwise than in fiction or contemplation of law, as the remaining or corresponding portion of the particular estate created under a discontinuance, and instantly vanishes as soon as reduced into possession. Thus, if a man be seised of lands in the right of his wife, and make a feoffment upon condition, and die; and afterwards the heir enter upon the feoffee for the condition broken, the estate is no sooner vested in him by the entry, than it instantly vanishes and vests in the wife. Co. Litt. 202. a. And see Litt. Sect. 632.

(14) A Warranty is in the nature of an adjunct to an estate; *et accessorium sequitur suum principale.* Thus, if A. infeoffs B. in tail, remainder to C. in fee, with warranty, and afterwards B. makes a feoffment in fee, to K., K. cannot vouch A. to warranty. Why? because the estate tail, to which the warranty was originally annexed, is determined, and, consequently, between A. and K. there is no privity. But though K. cannot vouch, he may nevertheless rebut A. supposing he should claim the land against his own deed of warranty to B.; for the warranty is still in force as an estoppel, and any seisin of the land, however tortious, is sufficient to give the feoffee the benefit of it. Co. Litt. 385. a.

But, in the confidence that the foregoing illustrations have already sufficiently exemplified the method of expounding and commenting upon the doctrines in question, which, at the same time that it gets rid of every difficulty, ensures the desired proficiency in this course of study, I will not now pursue them any further. Their apparent minuteness may be excused by the interest which we confessedly all have in the result of the Inquiry; and if, in the mean time, they shall have served to demonstrate, that it is no impracticable undertaking to bring the learning of " the Institute" within the reach of every intelligent student, they will have fully answered the general intention for which they have been produced. For my own part, I shall not have to regret the zeal which has prompted to their publication, nor will the studious reader have misspent his time in the perusal of them.

Upon a subject which has hitherto given rise to so much difference of opinion, even among professional men, it is not to be expected that either this, or any other plan of instruction that can be suggested, will meet with universal concurrence and commendation. But, independently of every other argument in its favour, it is to be observed, that the very practice " of discussing verbally," by which it is designed to be carried into effect, has its peculiar advantages. The information which is to be had from any written commentary, however explicit or circumstancial, is by no means to be so speedily acquired, nor is it so likely to be retained in memory, as that which is communicated by word of mouth, and made the subject of discussion between man and man. There is a monotony attending retired study, by which the attention is apt to be fatigued, and the spirits exhausted; while, on the contrary, the effect of oral communication is, to keep the mind upon the alert, and to render the understanding

more active. If any doubt presents itself, it may be instantly cleared up, every mistake corrected, every difficulty set aside. Another advantage it has, is, that of adapting itself in a peculiar degree to the respective abilities and proficiency of the learner. It is natural, that one man should be able to apprehend the drift, and to seize the points of an argument, much sooner than another; while that which is clear to one, to another will be often obscure or incomprehensible. But this inconvenience no longer exists under the proposed plan of instruction, which renders the proficiency of the learner a matter of calculation, and capable of being reckoned upon with certainty; and which is so much the more important, in the present instance, as there is hardly a single chapter, or single page to be produced, through the whole Institute, which does not shew the necessity of thus explaining by verbal discussion, in order to render the doctrines that are contained in it, intelligible and familiar to beginners (15).

A concluding remark may be suggested, on the method of common placing the Institute. Among the numerous publications intended to facilitate the purposes of expeditious reference, the most generally preferred in the profession is the well known digest of Chief Baron Comyns. "This very useful compilation," (to use the words of an eminent commentator[x]) "is equally admirable for its great variety of matter, its compendious and accurate expression, and the excellence of its methodical distribution." Supposing then the student to

x See the note 96. to Co. Litt. 17. a.

(15) See the Appendix, prop. 20.

follow the same plan of arrangement, I would have him, in the same manner, divide his common-place book into alphabetical titles, and regularly note down therein, in its proper place and order, the sum of his each day's collection from the learning of the Institute (16). And this, too, is the plea which Lord Ch. J. Hale recommends, in his preface to Rolle's Abridgment; "for," as he observes upon that occasion, "the student may assure himself, though his memory be never so good, he will never be able to carry on a distinct serviceable memory of all or the greatest part of what he reads, without the help of some such method." But I presume, with submission, that with the proposed alphabetical arrangement before him of the learning of the Institute, collected from his own particular reading and observation, instead of having eternally to recur to the unprofitable and insipid drudgery of index-hunting, he will never be at a loss, at any future period, to lay his hand upon whatever required doctrine or point in question he may happen to have occasion for. It is the peculiar advantage of the practice of discussing verbally, as recommended in the foregoing examples, to render this both an easy and delightful study; and how

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(16) In Mr. Cruise's "Law of real Property," we have the advantage of a systematic distribution of the doctrines of the Institute, relating to this branch of our jurisprudence, together with a methodical arrangement of their general principles, illustrated and supported by adjudged cases. But, as common-place books are chiefly valuable to those who make them, it may still be recommended to the student, to write down his own abstracts of what he reads, for the reason which Lord Hale gives, *in order to imprint them the more strongly upon his memory;* consulting, at the same time, Mr. Cruise's Digest, as he proceeds, by which he will find himself much assisted, and his labours infinitely abridged.

infinitely more professional and commensurate with the wide range of so comprehensive and sublime a science, than to tack together the mere shreds and patches of a common-place book, from the scattered marginal references in Blackstone's Commentaries! But there is also an inconvenience attached to this latter system, which is not unfrequently overlooked by "the many," until it becomes too late for it to be remedied. I mean, that, in consequence of having neglected the study of the Institute, before commencing practitioners, they seldom know how to help themselves to the right use of it afterwards, either in argument or by way of reference; for it is not by occasionally turning over the leaves of our Coke-Littleton, in the way of desultory and conjectural reading, that we are able to reach the sense of those elaborate and profound theorems, but by drawing our principles of construction, in a regular and connected chain of reasoning, from the whole mass and body of the work as from one context.

With respect to the professional student, there will no doubt remain a great deal still to be done, before he will be qualified for future practice; but, having mastered "the Institute," he will always have this grand advantage in his favour, that, whatever may be the subdivision of the law, or distinct line of practice, to which he intends particularly to apply, he will meet with no difficulties which he is not prepared to surmount,—no obstacles to retard his progress. Having the learning of the Institute, he will every where find the way smooth before him, and every path practicable. The learning of the Institute will have rendered every thing intelligible and easy to him (17).

(17) The books which are *usually* recommended to the student, who intends to apply himself, principally, to the practice

In the remaining observations I have to offer, it will be considered how far the same plan of education deserves to be recommended in a general point of view, and has a claim to the attention, not of the student alone, but of every gentleman and scholar in the kingdom. In the advice which Lord Ch. J. Reeve gives to his nephew, he

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of the courts of common law, and at nisi prius, are, besides Blackstone's Commentaries, and Lord Coke's Commentaries upon Littleton's Tenures, Wood's Institutes, Finch on the Common Law, Wright's Tenures, Plowden's Commentaries, Lord Hale's History of the Common Law, Gilbert's Tenures, Gilbert's History of the Courts, Fearne on Contingent Remainders, the Term Reports, &c. &c.; he will also have to peruse, at the same time, for the study of the law of nisi prius, Buller's Introduction, Selwyn's Law of Nisi Prius, Gilbert's Law of Evidence, Park's Law of Insurances, and so forth; and, in order to become acquainted with the practical forms,—Boote's History of a Suit, Tidd's Practice, Lord Coke's Entries, and some other books of the same description. If his views are directed to the practice of the courts of equity, namely the Courts of Chancery and Exchequer, it will be necessary to add to the preceeding course of reading, Fonblanque's Treatise of Equity, Peere William's Reports, Mitford's (now Lord Redesdale) Chancery Pleadings, Maddock's Principles and Practice of the Court of Chancery, and the Practical Register. There is also another course of reading for the study of crown law, for which the books, usually recommended, are, Lord Coke's Third Institute, Pleas of the Crown by Hale, Hawkins, and East; Starkie on Criminal Pleading; Leech's Crown Cases, and so forth. And, lastly, as a qualification for practice at the quarter sessions, and in order to become acquainted with justiciary proceedings, the student will have occasion to consult the settlement cases reported by Salkeld, Strange, Durnford and East, and other common-law reporters, and also Bott's Poor Laws, Fielding's Office of Constable, and Burn's or Williams's Justice!

thus briefly enumerates the objects for which this branch of instruction is chiefly valuable;—"1. to obtain precise ideas of the terms and general meaning of the law; 2. to learn the general reason whereupon the law is founded; 3. from some authentic system, to collect the great leading points of the law in their natural order, as the first heads or divisions of our future inquiry; and, 4. to collect the several particular points, and arrange them under their generals, as they occur, and as we find we can most easily digest them." Now, upon the system of explaining by verbal discussion, as recommended in the foregoing examples, I have no hesitation in pronouncing the Institute to be fully sufficient to answer all these purposes. Notwithstanding the seeming objections that have been raised against it, notwithstanding its antiquated style, its gothic structure, its difficult and often dark approaches, and the revolving seasons that have tempestuously rolled over it, it still stands the same mighty edifice, unrivalled and alone.

As in the fields, with Ceres' bounty spread,
Uprears some ancient oak his reverend head;
Chaplets and sacred gifts his boughs adorn,
And spoils of war, by mighty heroes won;
But, the first vigour of his root now gone,
He stands dependent on his weight alone.
All bare, his naked branches are display'd,
And, with his leafless trunk, he forms a shade.
Yet tho' the winds, his ruin daily threat,
As every blast would heave him from his seat;
Tho' thousand fairer trees the field supplies,
That rich in youthful verdure round him rise,
Fixed in his ancient seat, he yields to none,
And wears the honours of the grove "alone."

ON

THE SCIENCE OF THE LAW,

&c. &c.

PART IV.

Major enim hæreditas venit unicuique nostrum a jure et legibus quam à parentibus.

A FOURTH and last subject for our consideration, and which I trust will not be out of place here, or foreign to our present Inquiry, is that of the advantages of this course of study, as a plan of education to be recommended in general to every liberal scholar, let his future profession or particular scheme of life be what it may. In fact, there is no point of view in which the very agitation of a question of this nature can be otherwise than useful. It necessarily leads to information of which it often unexpectedly opens to new sources. The understanding is no sooner enlightened upon one point of learning than it becomes prepared for another; every new idea which it receives, is at once an increase of its acquired stock of knowledge, and supplies it with new powers for further investigation. I should not, however, have been led by these reflections alone into the observations which follow, if it were not also with the hope, that they may serve as directions to that respectable and numerous class of readers who are equally penetrated with a sense of the

obligation they are under, to become acquainted with this branch of useful instruction, though at the same time they have no intention to make it their profession.

One of the most obvious and natural conclusions to be drawn, whether from history or from the occurrences of active life, is that of the expediency of a comprehensive theoretical knowledge of the nature of the laws and constitution of our country. This is, indeed, a species of information which has been deservedly considered among the principal accomplishments of a gentleman; and yet it has been observed, to the reproach of the gentlemen of this country, "that they were formerly more remarkably deficient in it than those of all Europe besides." Blackstone, from whom I venture to repeat this remark, proceeds to observe, that "in most of the nations of the continent, where the civil or imperial law, under different modifications, is closely interwoven with the municipal law of the land, no gentleman, or at least no scholar, thinks his education is completed till he has attended a course or two of lectures, both upon the institutes of Justinian, and the local constitutions of his native soil, under the very eminent professors who abound in their several universities[a]."

An encomium so flattering on the one hand, and an imputation so discreditable on the other, are perhaps, in some measure, to be explained by the reflection, that, at the period alluded to, the continent was divided into many flourishing and happy states, whose independent and equally-balanced governments, seemed to vie with each other in doing justice to the principles of social union and civilization; they were so many sanctuaries,

a Bl. Comms. Introd. p. 4.

which afforded an asylum to the unprotected, and a refuge to the persecuted from oppression. Another grand benefit which also flowed from this distribution of the principal population of Europe into so many distinct independent sovereignties, was that of the "liberty of the press;" while the public opinion, which naturally grew out of it, by extending the empire of reason and of truth, ensured the progressive advancement of public happiness and virtue. They were these first causes, while they were yet in their infancy in this country, that, in the lap of those equally-balanced governments, rendered an impulse unknown before to the cultivation of letters and the promotion of useful learning. Political independence naturally gave birth to that of talents, and excited the spirit of emulation. With the desire of instruction, the opportunities of education were multiplied, and thus, under happier circumstances, and at a period far different from the present, our neighbours of the continent may have had, perhaps, the start of us, like the "precursors" of the Roman foot-race, in handing about the torch that was to illumine the moral world, and to dissipate the last lingering shades of superstition and slavish ignorance.

But, in the midst of this fair perspective of the advancement, not of learning alone, but of all the liberal and polite arts upon the continent, there arose that political and moral phenomenon, "a mighty and civilised people formed into an artificial horde of banditti; throwing off all the restraints which have hitherto influenced men in social life, displaying a savage valour directed by a sanguinary spirit, forming rapine and destruction into a system, and seemingly engaged in no less than a conspiracy to exterminate from the face of the earth, all honour, humanity, justice, and religion." From the period of that monster-breeding revolution, of which

the detestable impression has been hitherto perpetuated by the indiscriminating control of military conscription, we lose even the traces of what was once the "genius" of "civil education" upon "the continent." A melancholy picture might be drawn of the results of these inexplicable dispensations of divine Providence: the public mind unnerved and without energy,—the organs of public opinion annihilated,—the public feeling venting itself in unavailing curses, "not loud but deep,"—and the uses of education become unprofitable, and full of danger to the possessor!

——— So Violence
Proceeded, and Oppression, and Sword-law
Thro' all the land, and refuge none was found. (1)

From a scene like this, when we turn our attention to that which happily presents itself in our own country,

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(1) The restoration of the ancient dynasty in France, has happily produced a wonderful change in the state of the continent since these reflections were written. The unoffending citizens are not arrested and immured in dungeons, as they formerly were, for having incurred the suspicion of the tyrant; they are no longer at the mercy of an insolent and rapacious soldiery; and the youth are not dragged from their seminaries of education, from their counting-houses, and from agriculture, to fill up the ranks of military conscription. But, although the causes of the degenerated state of the public mind and character, have already ceased to exist, this is by no means the case with respect to the effect which they have every where operated. The public opinion *must have time* to revive, the public feeling to regenerate, and our neighbours of the continent to become again, *the mighty and civilised people*, even under the mild Government of their legitimate sovereigns of the house of Bourbon!

and contemplate with the veneration and gratitude which they must naturally excite in us, the dear and invaluable privileges and advantageous and dignified prerogatives of British subjects,—it would argue, indeed, a strange perversity of understanding, if, in the midst of these inestimable blessings, (unknown but in our own country, and hitherto beyond the reach of every other nation,) we could feel ourselves indifferent to the constitution under which they are derived, and strangers to the laws by which they are so wisely regulated and preserved. Under arbitrary or despotic governments, the privileges of the subject are often better not ascertained, which it becomes politically a crime to vindicate; but here, on the contrary, where *the supreme power* is no longer terrible but to the delinquent who has set the laws of his country at defiance, this species of instruction is inseparably interwoven with, and is essentially a sort of necessary introduction to, every principal public function and duty in society: it rises from speculative into practical, and administers to all the great purposes of active life; it informs the understanding of the patriot, directs the discretion of the magistrate, and is a guide to the statesman and the legislator. So much more peculiarly, in our own instance, does the knowledge of the local constitutions of our native land, form a principal and indispensable part of liberal and polite learning; and, therefore, "no gentleman, or at least no scholar, ought to think his education is completed without it."

But the expediency of an application to this course of study, on the part of those who have no intention to follow the law as a profession, is not only incumbent upon every gentleman in the kingdom, as a private duty; it is also matter of general concern, and is founded in the highest political considerations. The melioration of the

condition of men, in their social state, has been always the infallible result of the combined activity and talents of those who constitute what may be called the "thinking aggregate" of the community. From them the sense of duty is derived which informs the "conscience" of a nation, and gives to public opinion its proper tone and energy: they insensibly enlighten and enlarge the public understanding; they cherish and invigorate the feelings of patriotism, communicate activity to the wheels of government, and are at once the main-spring and the rallying point of whatever is calculated to promote the common weal and interest. We have here then a distinct point of view in which the dissemination of instruction, and especially of that most useful branch of it, "the knowledge of the laws and constitution of our country," contributes powerfully to influence our political condition and well-being in the rank of nations. Liberty, like empire, is maintained by the same arts by which it was acquired. This noblest inheritance of mankind has been transmitted to us by our ancestors, to be by ourselves transmitted, if not augmented and improved, at least without deterioration, to our posterity. And how, but by diligently looking into the nature and condition of the trust, can we be ever qualified to act with fidelity in the execution of it? This is an obligation which, in conscience, and upon every principle of honour and honesty, we are all bound to perform.

Neither, again, is there any other class in society to which these observations are more strictly applicable, than our gentlemen of independent estates and fortune, who are said to be at once "the most useful, as well as the most considerable body, in the nation, and whom even to suppose ignorant of this branch of learning, is treated, by the celebrated Locke, *as a strange absurdity*. There

are men who, from their personal insignificance of character, are below the dignity of reproof; the obscurity which circumscribes their exertions, throws a veil over their deficiencies, and screens them from observation. But it is far otherwise with respect to those whom happier circumstances have raised to the higher walks of life, and who have, consequently, pretensions, whether from birth or fortune, to be advanced to the most honourable functions of magistracy and legislation. In a situation of this kind, the man whose education has been neglected or ill-directed, may unwittingly become the instrument of the most serious mischiefs to the community. It was, upon this principle, a law among the Athenians, that they who took upon themselves to become the advisers and directors in the public administration of the affairs of the government, should be subjected to this alternative, "that if their counsels or services were such as to be eventually approved, they were to be rewarded for them; but, if otherwise, then to incur the same punishment as in the case of wilful and premeditated delinquency[b]." They held, that the maxim which of all others conduces most actively to the stability and glory of an empire, is "the responsibility of the deputed guardians of its interests."

Our common law has, likewise, in much the same spirit, disqualified certain persons from taking any estate in some particular things; as, "If an office, either of the grant of the king, or a subject which concerns the administration, proceeding, or execution of justice, or the king's revenue, or the common-wealth, or the interest, benefit, or safety of the subject, or the like; if these, or any of them, be granted to a man who is inexpert, and

b Demosthenes de falsâ Legatione, p. 309.

hath no skill and science to exercise or execute the same, the grant is void, and the party disabled by law, and rendered incapable to take the same, *pro commodo regis et populi*;" which is worthy to be known, (says Lord Coke,) and more worthy to be put in due execution[c]. It is thus, the wisdom of our law has set a barrier to the advancement of incapable and unskilful persons, and such as have no knowledge of the local constitutions of their native land, even in those situations of life which do but partially affect the interests and well-being of the community; how much more, then, is the same incapacity, the same unskilfulness and want of constitutional information, inexcusable in magistrates and legislators!

This pregnant subject of argument and expostulation has been repeatedly animadverted upon by many of our most admired writers. Blackstone, among others, has forcibly reminded the gentlemen, of whom I am now speaking, "that if they are honourably distinguished from the rest of their fellow-subjects, it is not merely that they may privilege their persons, their estates, and their domestics, — that they may list under party-banners, may grant or withhold supplies, may vote with or vote against a popular or unpopular administration; but upon considerations far more interesting and important. They are the guardians of the English constitution,—the makers, repealers, and interpreters of the English laws; delegated to watch, to check, and to avert every dangerous innovation; to propose, to adopt, and to cherish every solid and well-weighed improvement; bound by every tie of nature, of honour, and of religion, to transmit that constitution and those laws to their posterity, amended if possible, at least without deterioration. And how un-

c Co. Litt. 3. b. Ibid 234. a.

becoming must it appear, in a member of the legislature, to vote for a new law, who is utterly ignorant of the old! What kind of interpretation can he be expected to give, who is a stranger to the text upon which he comments[d]?"

It is true, that an attentive perusal of Blackstone's Commentaries has been generally held, of late years, to be a constituent part of the learning of our universities; so that "no gentleman, or at least no scholar, thinks his education is completed without it." But, if the object of this course of study is to teach gentlemen the constitution and character of the law, to disclose the theory of its principles, to explain the nature of the arguments and the reasons of judicial decision in general, and, above all, to inform and discipline the understanding, to impart the skill to investigate, the ability to discern, the promptitude to discuss,—I would certainly recommend, for all these purposes, the reading, not of Blackstone's Commentaries, but of Lord Coke's Commentaries upon Littleton's Tenures. When engaged in the prosecution of such important and useful instruction, why stop at the *ne plus ultrà* of Blackstone's Commentaries? Interested as they are, in collecting the ore of science, why not begin at once upon the Institute, which contains all the richest and the deepest veins of it? In the Institute, Lord Coke brings us at once upon the matter and the substance of the law. Embracing, with a giant's grasp, the collected principles of the whole circle of the science, he deals with us as nature does in forming a flower or any other of her productions, *rudimenta partium omnium simul parit et producit*,—he unfolds altogether and at once the whole system and the rudiments of all the parts. In a word, he throws open wide the gate, that all who have it at heart

[d] Bl. Comms. Introd. p. 9.

to be acquainted with the laws and constitution of their country, may enter in.

But there is likewise another point of view, in which the study of the Institute deserves the attention of every gentleman and scholar in the kingdom; and, notwithstanding the reverence I entertain for whatever has been sanctioned by the practices of our universities, I have no hesitation in affirming it to be, in this respect, a preferable study to that of Aristotle; I mean for "the exercise" and "discipline" of "the" reasoning "powers."

For, in the first place, it is to be observed of Littleton's Tenures, that, independently of their acknowledged intrinsic authority upon points of law, they afford, likewise, a complete specimen of that sort of institutional merit, which consists in uniting simplicity with precision, and in preserving an orderly and perspicuous distribution through a series of the closest and most profound reasoning. Upon points of law, indeed, no other legal authority is usually cited in our courts of justice, either with more approbation or with greater deference. But Littleton's chief excellence, as an institutional writer, and which, in my humble opinion, renders the study of his doctrines an infinitely important object of education, in the scheme of liberal and polite learning in general, consists in the point and perspicuity of his conclusions, and the propriety and precision of his language. Characteristically definite and argumentative in his manner of expression, he keeps up that constant train of close and sound logic, that inexhaustible flow of chastened and continuous reasoning, which alone gives dignity to learning, and distinguishes and graces the liberal scholar. In the words of his great commentator, "he teacheth a man not only, by just argument, to conclude the matter in

question, but to discern between truth and falsehood, and to use a good method in his study, and probably (with apt proofs and arguments) to speak to any legal question[e]."

Nec facundia deserit hunc nec lucidus ordo.

On the other hand, I do not mean to call the principal merits of Aristotle into question;—I own the prodigious universality of his learning, and would be the last to commit such literary sacrilege as to profane the altars and the statues, which, by the concurrence of all the learned in every age and country, have been erected, a well-earned tribute, to his memory. But I apprehend it to be by no means in derogation of these sentiments, when I assert, with submission, that he does not possess, in the same degree with Littleton, the *collateral* merit (if I may so call it)of instructing as well in *the manner* as in *the matter* of his communications; for, independently of the Greek text, by which the attention of the reader must be always necessarily much distracted, he expresses himself with a sort of affectation, which, in many instances, has the air of embarrassment, and often degenerates into obscurity. Perhaps the fact may be, that from an overweening fondness to make us think for ourselves, he not unusually leaves us so much to guess at, that we remain completely in the dark. In his analytics, for instance, in which he professes to teach the whole art of syllogistic reasoning, how seldom is it that we can flatter ourselves we understand the whole of what he intends; and as to his book of categories, it might confessedly have been comprised in as many lines as there are pages. It is likewise a principal objection to his ethics or moral doctrines, that his views are too general, and his

e Co. Litt. 235. b.

propositions much too metaphysical; and hence also are they distinguished by a sort of sterile jejune character, which offers us nothing to return to when we have once read them; being calculated rather to charge the memory than to produce any sensible change in our way of thinking.

I conclude, that "the Tenures" are, therefore, (generally speaking,) a better book than "the Analytics" and "the Catagories," for exercising and disciplining the reasoning powers, and, I apprehend, it will be readily conceded by all parties, that if we must necessarily be ignorant either of the one or of the other, it is far better that we should be strangers to the Ethics of Aristotle, than to that which Aristotle himself describes to be the principal and most useful branch of Ethics, "the knowledge of the laws and constitution of our country."

There is, however, a wide distinction to be taken between the labours of the professional and of the unprofessional student; for, according to those well-known words of Fortescue, "it will not be necessary for a gentleman, as such, to examine, with a close application, the critical niceties of the law. It will fully be sufficient, and he may well enough be denominated a lawyer, if, under the instruction of a master, he traces up the principles and grounds of the law, even to their original elements. Therefore, in a very short period, and with very little labour, he may be sufficiently informed of the laws of his country, if he will but apply his mind in good earnest to receive and apprehend them. For though such knowledge as is necessary for a judge, is hardly to be acquired by the lucubrations of twenty years, yet, with a genius of tolerable perspicacity, that knowledge which is fit for a person of birth and condition, may be learned in a single year, without neglecting his other employments."

But the sudent who intends, to follow the practice of the law, has not exactly the same encouraging perspective before him of the end of his future labours. Of him it will be expected, that having made himself completely master of the Institute, he is become the possessor of the whole stock of legal learning which is contained in it; that, having proceeded regularly through the solution of its many thousand theorems, he is consequently prepared and qualified upon so many thousand distinct questions, whether for decision or discussion. There is no pitiful calculation to be made of the *quantum* of what must necessarily fall within the line of future practice, to which he intends particularly to apply. On the contrary, it is the business of the professional student to read every thing, and his duty to be acquainted with every thing. A lawyer, in the abstract, is a sort of solecism; a being to be compared to the unskilful statuary described by the Roman Satirist, who could only work at particular parts of the statue;—

> Infelix operæ summâ, quia ponere totum
> Nesciet.

For my own part, from what I have been able to collect upon this most interesting and important subject, I apprehend it to be quite a new practice, that of subdividing the profession into so many distinct disconnected branches, as it forms at this day a principal feature in our modern system of educating and forming lawyers. How far, indeed, it may have its advantages within a certain point, and in relation to mere practical convenience, it is not for me to determine; but I do, indeed, affirm, with confidence, that it certainly ought never to be adopted as a rule of education, without the utmost caution and reserve.

It is only in mechanics that the division of labour is either expedient or profitable. When appled to science, its operation becomes defective and prejudicial; it habitually narrows and contracts the mind in its accustomed researches, impedes the execution of its noblest faculties, reduces it to abstract and confined views of things, and renders it ultimately incapable of attaining to that comprehensive and masterly reach of intellect, which, by bringing the remotest consequences within its commanding purview, is able to descend to the minutest objects, or to discuss the grandest difficulties, with equal facility and discernment.

And now, by way of concluding these observations, I will beg leave to remark, that it is not upon the strength of what happens to come within my own knowledge alone, that I presume to rely for the subsisting propriety of them; they stand upon authorities far more weighty and unquestionable. A very decided opinion upon this subject has been repeatedly and publicly expressed by many of our ablest judges, and those who have had the most confirmed experience in practice. If I may be allowed to mention any one in particular, where all are entitled to our unreserved and respectful deference, there is hardly a lawyer (I believe) in Westminster Hall, who is not aware that this was the constant theme of animadversion and regret with our late chief justice of the Court of King's Bench, Lord Kenyon. The learning of the Institute, in which he had so largely and deeply laid the foundations of his own education, he always strenuously recommended as an institute of education to others; and deprecated, in the strongest terms, the unscientific practice of originating the study of the law (as it seems was beginning about that period to be-

come the fashion) in copying precedents in an office, and in filling up the marginal references in Blackstone's Commentaries.

The profession of the law, is that, of all others, which imposes the most extensive obligations upon those who have had the confidence to make choice of it; and, indeed, there is no other path of life in which the unassumed superiority of individual merit is more conspicuously distinguished, according to the respective abilities of the parties. The laurels that grow within these precincts, are to be gathered with no vulgar hands; they resist the unhallowed grasp, like the golden branch with which the hero of the Æneid threw open the adamantine gates that led to Elysium. If I may carry on the same metaphor, "the experience of nearly two centuries, has pointed out to us the sacred tree from which "the golden branch" is to be obtained, and the venerable Manes of the departed Sages of the law, with solemn admonition, direct the approaches to it." But there is no need, in order to recommend this course of study, to resort to the language of enthusiasm. Having entered minutely (as I have done) into the explanation of its merits, and having illustrated the way of completing it in the course of a single year, I leave it to the honourable testimony which has been borne to it by our learned judge, "that it is at once the best, the easiest, and the shortest way of educating and forming men to be lawyers, with a view either to the Bar, the Senate, or the duties of Magistracy."

APPENDIX,

CONTAINING

THE ILLUSTRATION

OF CERTAIN

LEGAL PROPOSITIONS,

ALLUDED TO IN

THE FOREGOING ESSAY.

RATIO EST ANIMA LEGIS.

" It is then only we are said to know the law, when we apprehend the reason of the law, and when we can so far bring the reason of the law to our natural reason, that we perfectly comprehend it as our own." Co. Litt. 394. b.

HEADS OF APPENDIX.

PROPOSITION I.—*Of the Distinction which the Common Law takes between* feudal *and* commercial, *with respect to the Descent or Alienation of real or landed Property.*

PROP. II.—*Of the Nature of the Sources, from which the Arguments and Proofs of the Common Law are principally drawn.*

PROP. III.—*Of the* reasoning Theory, *or Common Sense of Pleading.*

PROP. IV.—*Theorem "that, by the Extinction of the Fee of a Seigniory, a particular Estate for Life, in that Seigniory, is also extinguished."*

PROP. V.—*Of the Distinction between Releases of* Estates *and of* Droits.

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APPENDIX.

PROPOSITION I.

Of the Distinction which the Common Law takes between feudal and commercial, with respect to the Descent or Alienation of real or landed Property.

EVERY alienation or conveyance of landed property which is originally of a "feudal" nature, is in a legal sense to be construed *stricti juris;* but where the conveyance is originally "commercial" in its nature, it is to be construed liberally. As for example: in conveyances at the common law, by deed, the insertion of the word *heirs* is necessary, in order to pass the inheritance to a purchaser; but there is no such formality required in the case of a devise[a]; the reason of this distinction is as follows. Upon the introduction of the feudal tenures into England, in the reign of William the Norman, it became a settled maxim or rule of law, "that the ultimate reversion of all the landed property in the kingdom vested in the king." Having assented to this fundamental feudal constitution as the basis of military discipline, our ancestors obliged themselves, by an oath of fealty, to hold their lands of him as their original proprietor, and to do the same homage for them, (in support of his title and in defence of his territory,) as if they had really received them from his bounty. Afterwards, subordinate infeudations began to be granted out upon the same principle: the tenant became the vassal of the lord of whom

[a] Co. Litt. 9. b.

he held his estate; and his personal services, when called upon, were made the condition or consideration of the tenure. We have here, then, the original meaning of the word fee, feud, or feif, which was indifferently given to those estates, not as at this day, in reference to their duration or quantity, but to denote their stipendiary or feudal quality; and, as the consideration upon which the estate was granted was personal, (the personal ability of the feudatory to serve in war,) the presumption, therefore, naturally arose, that the grant was intended to be confined to the life-time of the grantee alone, where it was not expressly declared otherwise. By the same rule, then, if A. grants an estate by deed, that is to say *by deed of livery of seisin*, to B. in fee, or to B. for ever, or to B. and his assigns for ever, it follows, that, in all these cases, B. shall take an estate for life only, and not the inheritance, because of the want of the word heirs. For, conveyances, by deed, derive their whole effect from the public act or deed of delivering seisin or corporal possession of the land, which, in substance, is no other than the original feudal ceremony of investiture; and, therefore, the form of the conveyance being feudal, the principles of its construction are held to be equally so. *Modus dat legem donationi* (1).

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(1) The statute of frauds enacts, that, in all such cases, there must now be a deed in writing; but this has made no alteration in the construction of these conveyances. It is still by the deed "of livery of seisin" the land passes, and not by the deed "in writing." The nature of the conveyance is not altered: *non quod scriptum est sed quod factum est inspicitur.* And this is the reason why the livery is usually endorsed, together with the names of the witnesses, upon the back of the deed; for the land passes by the livery, and without it the feoffee has only an estate at will. Co. Litt. 48. a. Ibid. 52. b.

But why, then, do we not adhere to the same principles in the construction of conveyances by devise?

We have seen that a feoffment, at the common law, by deed, is of no avail, without the specific act or ceremony of livery of seisin; and this was, during the feudal times, for two reasons: first, that it might appear against whom the præcipe was to be brought, in the case of a disputed title; and, secondly, that the lord might run no risk of being defrauded of his fines and services. But, it is evident, that these reasons did not apply where there was no livery, as in the case of uses for instance (2); for, the

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(2) Uses were the invention of very early times, from motives of fraud, fear, or convenience. First, of fraud: as, if A. having an infant son B. made a feoffment to C. *to the use* of B.; upon A's death the lord was defrauded of those grand fruits of military tenure, wardship, and marriage; and, if A. died without heir, the lord was further defrauded of his escheat. Again, where a tenant had a defective title, he had only to infeoff another to his use; and if, afterwards, a *præcipe quod reddat* was brought against him, he could plead *non tenet;* for the præcipe lay only against the actual tenant of the freehold, till the statute 1 H. 7. c. 1. which gave it against the *pernor of the profits.* It was thus, too, the statutes of mortmain were used to be avoided by infeoffing trustees *to the use* of the convent, when infeoffing the convent would have been a forfeiture. Secondly, of fear; and not only the fear of being impleaded in a real action, but also the fear of confiscation, which was always a very powerful motive in those troublesome times, when attainders were so frequent. (See Co. Litt. 272. a.) Thirdly, of convenience; for, by infeoffing to uses, they made their estates mouldable to the various purposes of raising portions for younger children, of creating contingent remainders, of limiting future or springing uses, and of devising by will, which, by the common law, they could not do, but only

use being granted distinct from the possession, no fines or services could attach to it, neither was the *cestui qui use* liable to the præcipe in the case of a disputed title. Now, if we apply the same reasoning to limitations by devise, we shall find them to be precisely within the same exception; for, not taking effect till after the decease of the testator, they can enure no otherwise than by way of declaration of *the use*, to which the seisin is afterwards silently executed by the statute (27 H. VIII. c. 10.) of uses. Therefore, because these devised estates are in their nature analogous to uses, and not to feoffments, they are allowed to operate as uses, and are reviewed with the same latitude of construction. Accordingly, if A. devises to B. for ever, or to B. and his assigns for ever, B. shall take the inheritance or fee simple, though the word "heirs" was not mentioned; for the word *forever* is a word of perpetuity, and sufficiently ascertains the testator's meaning; and the legal strictness, arising

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in certain places by the custom. Adapted to these various considerations, limitations by way of use were beginning to be generally resorted to through the kingdom, when Henry VIII. from the idea of his being thus defrauded (as he called it) of his feudal services, prevailed upon his parliament to pass the statute of uses (27 H. 8. c. 10.) which enacts, that the seisin shall be executed to the use by the mere operation of law, thereby making the *seisin* and the *use* convertible terms. It is, however, to be observed, that this has introduced no other material change in conveyancing than the addition of a trust, or, as Lord Hardwicke emphatically expresses it, just three words more. For, instead of A. infeoffing to C. as formerly, to the use of B. &c. he now infeoffs C. to the use of him and his heirs *in trust for* B.; and the statute having once operated to convey the *legal* estate from A. to C. its operation is held to be spent, so that it cannot operate a second time. See the note (231) to Co. Litt. 271. b.

from the feudal rules and maxims with respect to feoffments, is not to be regarded in this instance, for the reasons already mentioned.

Again, let us take the well-known rule of law respecting the reservation of rent,—that "rent reserved upon a lease derived out of a freehold, though reserved by the lessor to himself and his executors, shall go upon his decease to his heir, and not to his executor; and so *è converso*, if the lease upon which the rent has been reserved was derived out of a chattel, the executor shall have it, and not the heir, notwithstanding the lessor may have expressly reserved it to himself and his heirs, and not to himself and his executors [b]."

The distinction which the common law takes between feudal and commercial, with respect to the descent or alienation of real or landed property, has been attempted to be elucidated in the foregoing proposition, as it concerns the *form of the conveyance.* We have, in the present instance, to consider it as it applies to the *quality of the estate.*

It has been already remarked, that the constitution of feudal tenure was introduced into this kingdom, and became a part of the common law of landed property, at a very early period of our history. By the rules of succession, as they were consequently then framed upon feudal principles, the descent of lands was restricted, by the course of the common law, to those alone who were of the blood of the feudatory or first purchaser. It was presumed, that the fidelity of the ancestor would survive in his descendants, and be hereditary in his family; and, per-

[b] Co. Litt. 47. a. And see Saunders, 2. pt. 2. c. 59.

haps, too, that he might naturally transmit to his posterity his personal ability to serve in war, which was the principal condition of feudal tenure in general.

An estate thus constituted, and which could no otherwise be created than by the feudal ceremony of investiture, or public and solemn act of livery of seisin, was denominated a freehold, and he who had this species of seisin, which was always *for life* at least, was called the tenant; a term which appears to have been then used, not as at this day, to signify indifferently the tenant in possession, whether tenant for life or years, but to denote the proper tenant of the freehold, who was likewise tenant to the præcipe, and the ostensible person to whom the lord was to look for the discharge of his fines and services. Let us suppose, then, that such tenant of the freehold makes a lease for years, reserving rent to himself and his executors, and dies: now, by the course of the common law, the reversion descends to the heir and not to the executor; but if the executor could claim the rent, distinct from the reversion, then would the rent go in one direction, and the reversion in another; which would be creating a double tenure, contrary to the statute (18 Ed. I.) of subinfeudations. In as much then, as the heir is entitled to the reversion by descent, so also shall he have the rent as an incident thereto; for we have seen that the reversion and the rent cannot go in different directions; and, therefore, the law says, the reversion, which is the principal, shall draw after it the rent, which is but the incident. The maxim is, *accessorium sequitur suum principale, non ducit.*

On the other hand, estates which were less than freehold, as leases *for years* of every description, and which even to this day come under the general denomination

of chattels, were considered, under the feudal system, to be of little or no value; their tenure being of that precarious nature, that, till the 21st of Henry VIII. the freeholder had the power of defeating them, at any time, by a common recovery (3.) And, because these inferior tenants were not considered to have any property of their own in the land, but only an interest in the estate, as the bailiffs or farmers of the freeholder, their interest was allowed to vest upon their decease in their executors, like the stock upon the farm, and other personal goods and chattels in general; the heir having no more to do with these, than the executor has with the freehold (4). By the same rule, then, as the reversion expectant upon the determination of a lease derived out of a chattel, shall go as a chattel to the executor, in exclusion of the heir, so likewise shall the reserved rent (if any) as an incident thereto; and no stipulation to the contrary can give it a different direction;

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(3) The termor could not falsify a covinous recovery of the freehold before the stat. 21 H. 8. c. 15. because he could not have the thing to be recovered. Co Litt. 46. a.

(4) It is for this reason that the covenants in leases are required to be made with the heirs and assigns of the lessor, where he is himself the owner of the inheritance; but where he is only the lessee of the proprietor of the estate, then with his executors and administrators. For the same reason, where a term for years is devised, the devisee cannot enter without the consent of the executor. For the devisee, in that case, takes as legatee of a chattel, out of which the executor is bound to see that all the debts are paid before the legacies: the default of which would be a devastavit, and make him liable *de bonis propriis.* But with the freehold, the executor has no right to intermeddle; *causâ qud suprâ.* Co. Litt. 111. a. Ibid. 388. a.

for a condition which contravenes a settled maxim or rule of law, is of no effect, and ought to be rejected[z].

PROPOSITION II.

Of the Sources from which the Arguments and Proofs of the Common Law are principally drawn.

THE sources from which the arguments and proofs of the common law are principally drawn, are as follows:—

1. The received legal maxims, or rules and principles, which are described to be a sort of common ground, in the nature of postulates or axioms. There are, necessarily, certain "data" required in the explanation of the logic of the law, as in that of the logic of every other science; *quia contrà negantem principia non est disputandum.* Thus we say, the law admits no presumption of injuries (1); every thing shall be presumed lawfully done, until the contrary is proved (2); there is no crime where there is no criminal intention (3), and so forth.

2. There is another sort of proof drawn from the Year Books, the judicial records, and other authorities of law. *Res judicata* (says the legal maxim,) *pro veritate accipitur*[a]; *et à communi observantiâ non est recedendum*[b]; *et*

z Co. Litt. 206. b.
a Co. Litt. 103. a.
b Co. Litt. 186. a.

(1) Injuria non presumitur. Co Litt. 332. b.

(2) Omnia presumuntur legitimé facta donec probetur in contrarium. Co. Litt. 232. b.

(3) Actus non facit rerum nisi mens sit rea. Co. Litt. 247. b.

minimé mutanda sunt quæ certam habuerunt interpretationem[c].

3. From the original writs[d]; for these cannot be changed without act of parliament[e], and are, therefore, held to be of great authority for the proof of the law in particular cases[f].

4. From the forms of pleading: "For the law," says Lord Coke, "speaketh by good pleading, which is therefore said to be, *ipsius legis viva vox*[g].

5. From the entries of judgment. For the judgment is ever given by the court upon due consideration had of the record before them[h].

6. From approved precedents and usage. For that which is commonly used in conveyances is the surest way; and it is so much the safer to follow approved precedents; *quia nihil simul inventum est et perfectum*[i].

7. From non usage. For, as usage is a good interpreter of law, so non usage, (where there is no example to the contrary,) is a great intendment that the law will not bear it[k].

8. From consequences and conclusions of law, where the matter of proof is merely technical. As where it is proved by the pleading, that prescription is by the common law, and not by force of any statute, &c.[l] Or where the subsistence of a tenure between the lessor and the

c Co. Litt. 365. a.
d Co. Litt. 73. b.
e Co. Litt. 54. b.
f Co. Litt. 93. b.
g Co. Litt. 115. b.
h Co Litt. 39. a.
i Co. Litt. 229. b. 230. a.
k Co. Litt. 81. b.
l Litt. Sect. 170.

lessee for years, is proved by the words of the writ of waste[m].

9. From the common opinion of the learned in the law. For this is a consequence of the rule of law, *à communi observantiâ non est recedendum; et minimé mutanda sunt quæ certam habuerunt interpretationem*[n].

10. From what would be generally inconvenient. *Ab inconvenienti.* For the law was made for the avoiding of inconveniences; and, consequently, where any particular construction of a doubtful point can be shewn to be productive of a public inconvenience, it is always a forcible argument, in law, against its being adopted[o].

11. From reasoning by enumeration, or, as the logicians call it, *à divisione.* As where, in the case of a feoffment made on condition, that the feoffee should pay a yearly rent to a stranger, it is proved that such annual payment is not properly a rent, though so called in the indenture. For if it should be a rent, then must it be either rent-service, or rent-charge, or rent-seck; but it is not any of these, and, consequently, is not properly a rent[p].

12. From the greater to the less. *A majori ad minus.* As where it is argued that a recovery, which is matter of record, and consequently of the highest nature, being insufficient to bind him who is in prison at the time of the default made, *à fortiori* he shall not be bound in the like case by a disseisin and descent, &c. for these are but matter of fact and not of record[q].

m Litt. sect. 139.
n Co. Litt. 365. a.
o Co. Litt. 97. b. 97 a.
p Litt. sect. 345.
q Litt. sect. 438.

And so on the other hand, from the less to the greater. *A minori ad majus.* As where it is argued, that livery of seisin within the view, being allowed in the case of a feoffment, which passes a new right, *à fortiori* a seisin within the view shall be allowed for the restitution of an ancient right, which is so much the worthier and more respected in law[r].

13. From that which is impossible; *ab impossibili.* As where it is argued that a disseisin and descent shall not bind him who is out of the realm at the time, from the impossibility (according to common presumption,) of his having cognizance of the same[s].

14. From the end; *à fine.* For that which is nugatory in its effect, or to no definite legal end and purpose, the law never requires: as, where the tenant for life, with a mediate remainder to himself in fee, granted the remainder to another, he was not required to attorn to his own grant, &c[t]. By the same rule, again, if there be two coparceners, and lands are given in frank-marriage with the one, if these lands were of equal value at the time of the partition, they shall not afterwards be put in hotchpot; for, in that case, the effect of the hotchpot has been anticipated by the gift in frank-marriage[u].

15. From that which is useless, or of no ultimate benefit to the party. And therefore the villein, (while tenure in villeinage subsisted,) could not bring an appeal of mayhem, in which he recovered only damages, against his lord[x]. For the incapacity to acquire any thing for his own benefit, was one of the harsh characteristics of the villein's condi-

r Co. Litt. 252. a.
s Litt. sect. 440.
t Litt. sect. 578
u Litt. sect. 273.
x Litt. sect. 194.

tion, according to the then maxim, "*quicquid acquiritur servo, acquiritur domino*[y].

16. From that which is absurd or repugnant to common understanding; *ex absurdo.* As, if a feoffment were made upon condition that the feoffee should not alien, &c; for such condition would be repugnant to the state of the land passed by the feoffment[z]. And so it was where a remainder was limited to commence upon the tenant's aliening; for, in that case, one and the same estate would vest in two several persons at the same instant; *quod esset absurdum*[a].

17. From that which is contrary to the course of nature. As if a relief of a bushel of roses is due out of certain lands, and the tenant dies at Christmas, the lord cannot destrain for his relief till the time of the growing of the roses[b]. *Quia lex spectat naturæ ordinem; et impossibile est quod naturæ rei repugnat; et lex neminem cogit ad impossibilia.*

18. From the order of religion. As when it was shewn that if a villein became a monk professed, he could not be reclaimed by his lord, because a man of religion should live according to his profession of religion; and this, if the monk were taken out of his house, he could not do[c].

19. From common presumption. As where the issue in tail, was held to be barred by the warranty of a collateral ancestor, upon the common presumption, that a man would not unnaturally disinherit his lawful heir, without leaving him some other recompence[d]. Or, where

y Co. Litt. 117. a.
z Co. Litt. 223. a.
a Co. Litt. 378. a. b. Richel's case.
b Co. Litt. 92. a. 1
c Co. Litt. 136 b.
d Co. Litt. 373. a.

the child of a married woman, whose husband is living within the realm, is presumed to be the child of the husband[e].

20. From ancient lectures and readings upon different statutes. For these declare what the common law was before the making of the statute; they likewise open the true sense and meaning of the statute; they distinctly set before us one point at the common law, and another upon the statute; they produce authorities, arguments, and reasons for proof of the opinion of the reader, and for confutation of objections against it; and, lastly, they defeat subtle inventions to creep out of the statute[f], and so forth.

It suffices to have thus generally explained, that the knowledge of the arguments and the reasons of the law, is to be deduced from these and the like sources, in order to show *how necessary it is,* (I repeat Lord Coke's words,) *that he who comes to the study of the common law, should come, as Littleton did, from one of the universities, where he may have learned the liberal arts, and especially logic*[g],

PROPOSITION III.

Of the reasoning Theory, or Common Sense of Pleading.

The multiplicity of disputes and controversies which are every day submitted to judicial determination, has evinced the necessity of prescribing a regular method of

e Co. Litt. 373. a.
f Co. Litt. 280. b.
g Co. Litt. 235. b.

proceeding in order to prepare them for legal examination; this is, in few words, the history of what is called "special pleading," and which in fact is only another name for that sort of logical discussion of the subject of complaint or controversy, which enables the court and the jury to discover, at one view, the number and nature of the precise points in dispute, upon which the parties are at issue. That we have usually indeed so much seeming obscurity to contend with, at least upon our commencement of this course of study, is a natural consequence, not of the want of evidence in things, but of the defect of preparation in ourselves, and more particularly of our not being conversant in the meaning of *the terms of art*, which experience has shewn to be necessary to be resorted to, in this branch of learning, for the sake of certainty, brevity, and convenient precision. In this, however, it is to be observed, that the law, with regard to its technical phrases, stands upon the same footing with other studies, and requires only the same indulgence. The science of special pleading is not more difficult to be explained by a teacher, than the science of rhetoric itself. Having succeeded in distinctly and fairly understanding *the terms of art*, we are enabled to perceive, in a short time, and with very little labour, that the various doctrines and rules of pleading are of a nature to be demonstrated upon the principles, upon which they were originally suggested, of plain reason and common intendment; and that they have usually no further authority in practice, than in proportion as they are calculated to promote the ends of substantial justice, whether by guarding against surprize, by preventing confusion, by saving time to the court and jury, or by defeating the subterfuges of the dishonest disputant, and compelling him to come to an issue upon the precise points in question between the parties.

For example. *In order to guard against surprize,* it is a rule in pleading, (in all personal actions,) that all such matters as must necessarily preclude the plaintiff from his action, without, at the same time, amounting to a total *traverse* or denial of the *declaration*, shall be pleaded *specially*. Thus, if A. brings an action of covenant against B. he comes prepared to give evidence of the covenant, and not to disprove the nonage of the defendant or other special matter, which might possibly be alleged against him; and, therefore, *in such case*, it is but strictly reasonable, and consistent with common justice, that the defendant should be obliged to plead *the special matter*, in order to apprize the plaintiff of the particular nature of the defence.

Again, *in order to prevent confusion*, the law will not allow the plaintiff, in his replication, to vary from his original declaration, nor the defendant, in his rejoinder, to depart from his plea. Thus, if the defendant (in an action of covenant) pleads performance of the covenants, and the plaintiff replies, "that he did not perform some particular act according to his covenant," and the defendant rejoins, "that he offered to do it," this is a departure, and therefore, bad in pleading. For it is one thing *to do* and another *to offer to do it*: and if this sort of pleading were to be allowed, the altercations might be carried on to an endless length, and the court be left in the dark at last, and uncertain for which of the parties to give judgment.

Having shewn the common sense of these general rules, let us now take the technical maxim, "that the plaintiff (in an action of debt) must traverse the surplusage, if any, and not the tantum;" which I shall endeavour to demonstrate to be no more than a maxim of plain reason,

grounded upon the propriety of defeating the subterfuges of a dishonest disputant, and compelling him to come to an issue upon the precise point in question, between the parties. Suppose, for instance, A. brings an action of debt against B. for twenty pounds, and B. pleads thereto, *that the debt was 30l. and not 20l. only, as the plaintiff has thereof alleged against him;* this is what, in the language of the law, is called pleading *a surplusage.* But in an action of debt, which is grounded on an express deed of contract between the parties, if the proof varies from the declaration, it is evidently no longer the same contract whereof the performance is sued for. A man can no more bring an action for 20*l.* and recover 30*l.* than he who brings an action for a horse can recover an ox. Suppose, then, the plaintiff persists in his original demand of the *20l. only,* he must necessarily lose the benefit of his action by the operation of the supposed surplusage. But if he *traverses the surplusage,* (as by adding words to the following effect, " *without this, that the debt was of the other 10l. surplusage,*") he then reduces the debt to the exact sum which constitutes the original demand, or cause of action, and of which no further proof is necessary; for the defendant has already admitted and confessed it " inclusively" in the greater sum. *Omne majus continet in se minus.*

Again; to bring another example in illustration of the same rule: suppose the plaintiff, in debt for rent, declares on a demise of 20 acres rendering rent, and the defendant pleads thereto, " that the demise was of 26 acres, and not of 20 acres *only,* and that the plaintiff entered and suspended him from the other six acres, and that, therefore, he ought not to have and maintain his action thereof against him." Now, the question, in this case, is not of the demise, in the declaration, of the 20

acres, for that is *admitted and confessed* by the defendant "inclusively" in the 26 acres, but whether or not the demise was of the other six acres, which constitute *the surplusage*. For if these are no part of the demise in question, the alleged interruption has nothing to do with it; and, consequently, which ever way that is found, the cause must evidently be determined.

Et sic de cæteris (1).

PROPOSITION IV.

Theorem, that by the Extinction of the Fee of a Seigniory, a particular Estate for Life in that Seigniory is also extinguished[a].

Suppose A. and B. lord and tenant in fee simple. A. leases his seigniory for 21 years, to C. and afterwards A. releases to B. and C. generally. If C. accepts the release, his estate in the whole seigniory is immediately extinguished for ever; for the first operation of the release was to make B. and C. joint-tenants of the seigniory for life, with remainder to B. in fee; because a release of the seigniory to the tenant of the land can only operate by way of extinguishment; for otherwise the tenant would be paying services to himself, *quod esset absurdum*. Also, such release being made "generally," is good to extinguish the fee, without the word heirs being inserted, be-

a Co. Litt. 280. a.

(1) For an accurate and compendious introduction to the learning of pleading, the student may consult Comyn's Digest, under the title "Pleader."

cause a release is always to be taken most strongly against the releasor, who ought to have explained himself (1); and, likewise, because such releases were always favoured at the common law, on account of their tendency to unite the fee, the feudal services being more easily collected from one tenant than from many. But, with respect to C. it operates *per elargir son estate*, not to a fee for want of the word heirs, (for a release *per elargir le estate* is in the nature of a grant, and, consequently, the word heirs is necessary in order to pass the inheritance,) but to the greatest possible estate not of inheritance, and this is an estate for the life of C. And C. being thus seised, as joint-tenant of the whole seigniory, "*per tout* as well as *per my*[b]," his lease for years in the whole seigniory is, consequently, merged; that is to say, the term for years, which is but a chattel interest, is drowned or extinguished in the freehold. Secondly, B. and C. being thus joint-tenants for life of the whole seigniory, remainder to B. in fee, and B. being also tenant of the land it follows, that all the estate which B. could have by the release, namely, the moiety of the freehold, and the remainder in fee in the whole seigniory, is now become extinct, and, consequently, the jointure severed; and, therefore, C. remains tenant for life of a moiety, the

b My. abbreviated for moiety.

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(1) It is a rule of law, that, in all doubtful cases, the exposition of the words of a contract shall be taken most strongly against him, who ought to have explained himself. For example: if two tenants in common grant a rent of 20*s*. this is to be understood to be several, and the grantee shall have 40*s*. And so on the other hand, if they make a lease and reserve to themselves 20*s*. they shall have only 20*s*. between them, upon the same principle. Co. Litt. 197. a. Ibid. 267. b.

fee of that moiety being extinct. But it is a maxim of law, that when the fee of a seigniory is extinct, there can no longer exist a particular estate for life in that seigniory; because every particular estate implies a tenure or attendance over, which is here expressly negatived[c]. Also, it is another maxim, that since every particular estate is only a portion (*particula*) of a fee simple, when the corresponding portion does not exist in deed, it is always supposed to exist, or, in other words, is created for conformity-sake, in fiction or contemplation of law (2). But, in the present case, there can be no such fiction, because there is an actual release, which necessarily operates to extinguish the fee; and, consequently, the fee being extinguished, C.'s estate for life in the seigniory is also extinguished by the same act by which it was created, for the benefit of B. the tenant.

c Co. Litt. 312. b. ibid. 152. b.

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(2) Suppose, for example, A. tenant in tail, with limitation to his issue female, leases to D. for life, and dies, leaving a son and daughter. Now the estate-tail having been discontinued by the lease to D. for life, the entry of the daughter is taken away. For when A. made the lease to D. for life, he assumed to have the reversion or corresponding remainder in fee simple in himself. Upon A.'s death, that reversion descended to the son, who was A.'s heir at the common law, and who, if D. commits waste, may have an action of waste, which the issue in tail cannot have, because of the discontinuance. But no sooner is this fictitious reversion reduced into possession, than it instantly vanishes. The estate-tail revives as before, the discontinuance and the right of entry accrues, at the same instant, to the issue in tail, according to the original limitation. Co. Litt. 333. a. 338. a.

PROPOSITION V.

Of the Distinction between Releases of Estates *and of* Droits.

The release of an estate, is where there is already a vested estate at the time of the release made, both in the releasor and the releasee, and *privity* between the parties; that is to say, the releasee's estate must be *immediately* derived out of the releasor's estate, so that the two estates, together, make but one and the same estate in law. But the release of a droit, is where the releasor's estate has been previously divested or turned to a right, as in the case of abatement, intrusion, disseisin, discontinuance, or deforcement; and, consequently, where no privity is required, nor indeed can, from the nature of the case, exist between them[a].

As for example: if A. seised in fee, in right of his wife B. makes a lease, for 40 years, to D. and afterwards A. dies, and afterwards B. releases to D. generally, this is the release of *an estate*, and operates *per elargir le estate* of D. from a chattel to a freehold. But if A. being so seised, makes a lease for life to D. and afterwards A. dies, and afterwards B. releases to D. generally, this is the release, not of *an estate*, but of *a droit*, and operates *per extinguisher le droit* of B. in confirmation of D.'s lease for life, and also of the reversion which is in the heir of A. Why? Because, in the first instance, the lease was not void, but voidable. It divested not the estate of the wife; but, on the contrary, until avoided, it binds her estate. For the husband, who made the lease, had the *jus posses-*

[a] Co. Litt 266. a. ibid. 275. a.

sionis, or right of possession of the inheritance in the right of his wife, and now, the husband being dead, the possession of the lessee of the term is, in construction of law, the possession of the wife as tenant of the freehold, out of which the term is derived (1). But it is a maxim of law, that the estate which I may defeat by my entry, I may equally make good by my confirmation[b]; and, therefore, the wife, upon the death of the husband, as above-mentioned, may confirm the estate of the lessee for years if she will, and not only by her express, but also by her implied confirmation, as by acceptance of rent (2), or any other act by which she tacitly admits the lessee to be her tenant. It follows, that the release from B. to D. is, in its first operation, an implied confirmation of D.'s estate; and, secondly, being made generally, it operates *per elargir son estate*, from a chattel to a freehold (3). But, in the latter example, in which the husband is sup-

b Co. Litt. 300. a.

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(1) A lease is considered as a covenant real, that binds the possession of lands into whose hands soever it comes, if the lands be not evicted by a superior title; yet the termor has not the freehold in him, but holds the possession as bailiff of the freeholder, *nomine alieno*, by virtue of the obligation of the covenant. See the note 188. to Co. Litt. 249. a.

(2) The acceptance of the rent is a sufficient declaration, that it is her will to continue the lease, for she is not entitled to the rent, but by the lease. See the note 117. to Co. Litt. 215. a.

(3) In a note in Saunders, (see vol. 3. case 32. n. 9.) it is suggested, that there is no privity between the wife and the lessee of the husband; but see 1 Bac. Ab. 302. 3 Bac. Ab. 305. Plowd. 137. and Cro. Jac. 332. The lease was not void by the death of the husband, but only voidable, and now being made good by the confirmation of the wife, the law supplies the required privity between the parties. See Co. Litt. 272. b. And see the prop. 19. of this Appendix.

posed to have leased to D. "for life," he has thereby divested or displaced the wife's estate, and turned it to a *droit*. He has also created a new reversion "in fee," which upon his death descends to his heir at law; and the wife could not avoid these estates by her entry at the common law, but only under the statute[c].

There is also a further distinction to be observed between releases of estates and of droits; viz. that the release of an estate admits of being qualified at the will of the releasor. Thus, the lord may release his seigniory to the tenant of the land, whether in fee, or in fee tail, or for life, or for term of years. But the release of a droit admits of no such qualification; for, if released but for an hour, it is extinguished for ever[d].

PROPOSITION VI.

Of the Distinction between droiturel and tortious Conveyances.

DROITUREL conveyances are of the right only, and not of the possession, and are either primary or secondary. Of the first description are all original conveyances of things which lie only in grant, and not in livery, and of which no visible possession can be delivered, as advowsons, rents, commons, reversions, and other incorporeal hereditaments. Those of the second class, are, where there is already such subsisting privity of estate between the parties, that any further delivery of possession would be vain and nugatory; as in the case of release, confirmation,

c Stat. 32 H. 8. c. 33. And see Co. Litt. 297. b. 326. a. 338. b. 339. b.

d Co. Litt. 274. a. 280. a.

and surrender. Conveyances which are thus made, can be evidently no other than droiturel, that is to say, they cannot enure to pass more than may be innocently or rightfully conveyed; for the transfer of a right becomes a mere nullity when exercised beyond the subsisting right to transfer; *nemo potest plus juris ad alium transferre quàm ipse habet*[a]. On the other hand, all original or primary conveyances, which are wrongfully made of things in livery, as of lands or tenements, (of which the corporal possession is made over by the act of livery of seisin without any reference to the right,) are said to be tortious. Thus, if A. tenant in tail, leases to C. for life, remainder to D. in fee, the discontinuance is in fee; for both estates are created by one and the same livery. But if A. having leased to C. for his life, had afterwards granted the reversion to D. in fee, the discontinuance would have been then for life only, and not in fee; for the reversion lies in "grant," and not in "livery." And so it is of a bargain and sale enrolled, a lease and release, a covenant to stand seised, and the like. They are all of them droiturel or innocent conveyances, because they operate upon the right only, and not by transmutation of the possession, and, consequently, can convey no more than may be rightfully and lawfully conveyed [b].

Again; if tenant in tail makes a feoffment, it is a discontinuance, because the feoffee's estate is created by livery of seisin, and is of a greater quantity of estate than can be lawfully carved out of an estate-tail. But if the tenant in tail is disseised, and releases in fee to the disseisor, albeit the fee is not his to release, yet it is no discontinuance; for there is no transmutation of the posses-

a Co. Litt. 309. b.

b See the note (231) Co. Litt. 271. b.

sion or freehold by the release, but only a transfer of the right[c]

Again, take the following case of a mortgage, which is not at all uncommon. A. tenant in tail, makes a mortgage to D. by lease and release, and dies; and afterwards B. the issue in tail, enters and suffers a recovery. In this case the recovery is good, notwithstanding the mortgage; because the conveyance by lease and release was *droiturel*, and consequently determined upon the death of the tenant in tail, and entry of the issue. But, if the mortgage had been by feoffment, it would have been otherwise, because the feoffment would have operated as a discontinuance, and the issue could not have made a tenant to the præcipe until he had first defeated that discontinuance, which he could not do by his entry, but only by his action.

Upon the same principle, where there are powers relating to land, which have their operation under the statute of uses, or the statute of wills, the tenant by a tortious conveyance, may often extinguish such of those powers as are said to be "in gross;" but if the conveyance is droiturel, they remain unaltered. As for example: "If tenant for life, with a power to jointure an after-taken wife, conveys a life-estate by bargain and sale, lease and release, or covenant to stand seised, this conveyance will not affect the power of making a jointure. If he even makes a conveyance in fee by any of these assurances, as it is not their operation to pass a greater estate than the grantor has a "right" to convey, the power in gross is not affected by it; but if he conveys by fine, feoffment, or recovery, as these assurances not only

c Co. Litt. 42. a. 252. a.

pass the estate of the grantor, but convey a tortious fee, they necessarily disturb the whole inheritance, and consequently divest the seisin, out of which the uses to be created by the power are to be fed; they, therefore, operate in extinction of the power[d]."

It is to be further remarked, that the law will intend every conveyance, wherever it can be so intended, to be droituel rather than tortious. For example: suppose A. grants to B. in tail, keeping the reversion to himself. If, afterwards, B. re-infeoffs A. the law will intend this to be only a surrender of B.'s particular estate, and on B.'s death the issue in tail shall enter. For, if A. had taken by feoffment, he would have tortiously defeated his own reversion, which would be against the received maxim, "that a small estate by right, is to be preferred in law to a greater estate by wrong[e]. And so, again, if lands are given to A. for life, remainder to B. for life, remainder to C. in fee, and afterwards B. disseises A. he acquires by the disseisin a fee simple; for the law will not allow him to qualify his own wrong[f]; but if, afterwards, A. dies in the lifetime of B., his wrongful estate in fee is changed, by judgment of law, into the rightful estate for life, and consequently the old reversion is again vested in C. as before the disseisin (1).

d See note (298) Co Litt. 342. b.
e Co. Litt. 42. a. 252. a.
f See note (255) Co. Litt. 296. b.

(1) The construction which is agreeable to law, is always to be preferred to that which is against the law. Thus, if tenant in tail leases to another *for life*, it shall be construed to be for his own life, for that stands with the law, and not for the life of the lessee, which it is beyond his power to grant; but otherwise it is, if the lessor has fee simple. *Et sic de cæteris.* Co. Litt. 42. a. b. Ibid. 183. a. b.

PROPOSITION VII.

" *Of the Distinction between descendible Freehold and Fee Simple qualified*(1)."

A FEE simple qualified is the same in quantity of estate as a fee simple absolute; it has, likewise, all the incidents to a fee simple absolute, as inheritance, dispunishment of waste, right of dower and curtesy, and so forth, being only less than a fee simple absolute in respect of its duration[a]; but a descendible freehold is without any of those incidents, being in effect no more than an estate *per autre vie*, to which the heir succeeds, not as heir at the common law, but as the person specially appointed in place of an occupant[b].

For example: " If tenant in tail do grant to another all the estate he hath in the tenements to him entailed, by deed of bargain and sale, (which is required to be enrolled by the statute 27 H. VIII. c. 16.) to have and to hold to the other, and to his heirs for ever;" it operates as a droiturel conveyance of his whole estate and interest[c]; and, consequently, as the grantor had an estate of inheritance in fee tail, so the grantee takes an estate of inheritance, not indeed of fee tail, because of the want of the proper words of limitation, " to the heirs of the body

a Co. Litt. 18. a.
b Co. Litt. 41. b. . And see the note 241.
c See note 231. Co. Litt. 271. b.

(1) The distinction between descendible freehold and fee simple qualified, has been probably admitted since Littleton wrote. See Litt. sect. 612. 650. Co. Litt. 331. a. Ibid. 345. b.

of the grantee." neither is it of fee simple absolute, because it must necessarily determine upon the dying without issue of the tenant in tail; but, in all other respects, this determinable or qualified fee simple has the properties of a fee simple absolute, it shall go to the heir as an inheritance,— the widow shall be endowed, the husband shall be tenant by the curtesy, and the tenant in tail shall not have an action of waste because he has parted with the reversion[d]. But, "if tenant in tail do grant to another all the estate he hath in the tenements to him entailed by deed of lease, to have and to hold to the other and to his heirs for ever;" this is no inheritance to the grantee, but a mere descendible freehold[e]. For the operation of the lease is only upon the freehold, leaving the fee or inheritance in the lessor and his heirs, of whom the lessee holds as of the reversion. Suppose, then, the grantee enters under the lease, and afterwards dies during the life of the tenant in tail, it is not the inheritance that descends to the heir of the grantee, but the mere freehold which the grantee himself had, and to which his heir does not succeed by descent, at the common law, as in the former case, but by force of the special words of the original grant; and, consequently, in case of waste or forfeiture, the tenant in tail may have an action of waste, or may enter, &c. in right of the reversion.

And so, again, if a person seised of an estate *per autre vie*, devises it to one and *the heirs of his body*, this is no estate tail, for all estates tail must be of inheritance, be dispunishable of waste, have right of dower, and must also be within the statute *de donis*[f]; but it is the limitation of a descendible freehold; and the words *heirs of the body* are no more than a description of

d Co. Litt. 53. a. Ibid. 356. a. And see note 246. Co. Litt. 331. a.
e Co. Litt 333 a.
f Co. Litt. 224 a.

the person who shall hold the same during the life of the *cestui qui vie*, to prevent an occupant[g].

It is further to be observed, that descendible freeholds were not devisable under the statute of wills, (32 and 34 H. VIII.) but were made so long afterwards, by the stat. 29 C. II. which also makes them assets in the hands of executors and administrators for the payment of debts and legacies; for, by the common law, no executor could succeed to a freehold. And again, by stat. 14 G. II. c. 20. the surplus of such estates, after payment of debts, &c. is made distributable like a chattel interest. But this does not apply to the estate of the bargainee of tenant in tail, which was before devisable under the statute of wills. And as of a bargain and sale enrolled, so it is of a lease and release without any enrolment, because it operates as a feoffment at the common law. (2)

g Co. Litt. 388. a.

(2) Co. Litt. 207. a. That is to say, it conveys the same quantity of estate, supposing the releasor to have the inheritance, but in other respects the operation of a feoffment is very different; for, if tenant in tail make a feoffment, it is a discontinuance; but a bargain and sale under the statute, or a lease and release at common law, cannot work a discontinuance, because they are but *droiturel* conveyances, operating upon the right only, and not upon the possession. *Vide ante*, prop. 6.

PROPOSITION VIII.

Of the Distinction between Estates limited in Contingency by Deed, and by Devise.

In the case of a fee being limited in contingency "by deed," there remains no more in the grantor and his heirs than a mere possibility of reverter and no estate of reversion; for the whole *estate* passed out of the grantor at once, by the act of "livery" of "seisin," which alone gives effect to this species of conveyance[a]. But the operation of a devise being no more than the declaration of the use to which the land shall be subject after the testator's death, he is therefore at liberty to dispose of as much or as little as he thinks fit, and whatever he does not dispose of, as it remains vested in himself during his life, so it descends to his heir after him[b]. In the former case, if the inheritance is limited in contingency, the fee is, therefore, said to be in abeyance; that is to say, it is only in the remembrance, intendment, and consideration of law, *caput inter nubila condit;* but, in the case of a devise, it descends to the heir at law, and remains vested in him, until the contingency happens. For example, if A. leases to C. for life, remainder to the right heirs of D. the inheritance is plainly neither granted to C. nor D. and it cannot vest in the heirs of D. till after D.'s death, *quia nemo est hæres viventis;* and, consequently, as A. cannot retain it against his own grant and livery, it remains in suspense, *in nubibus,* or in abeyance[c]. But, if A. devises (which is in the nature of a limitation of the use, as well as the other express modes pointed out by the statute of

a Vide ante, p. 24. note g.
b Co. Litt. 23. a.
c Co. Litt. 342. b.

uses,) to C. for life, remainder to the right heirs of D. and dies, the reversion in fee, during the suspense of the contingency, descends to the heir of the testator; for the law never supposes the fee to be in abeyance, unless where it is necessary to recur to that construction; and, in the present case, there is no such necessity; for this was no parting with the possession (as in the former instance,) by *livery of seisin*, but a mere declaration of the use; and the statute only executes the seisin in the same proportion in which the use was disposed of, and nothing more. Supposing then, the heir and the devisee for life to join in a common conveyance, in the life-time of D. the two estates being thus united together in succession, the particular estate will merge in the reversion, and the contingent remainder be defeated and destroyed for ever. But, this it cannot be in the former case, where the limitation was "by deed;" for the particular estate does not merge in the possibility of reverter, but only in the estate of reversion.

It is, however, to be observed, that where the particular estate and the reversion come, by one conveyance, to the same person, there can be no merger of an intervening contingent remainder; because it would evidently contravene the intention of the grantor or devisor. But, otherwise it is, where the particular estate comes by one conveyance, and the reversion by another; for there the operation of law has to contend with no such repugnance. Thus where an estate is left to B. for life, remainder to the unborn son of D. in tail, remainder to the right heirs of B., B. takes a fee executed, subject to the possibility of the contingent remainder vesting. But if B. suffers a recovery, before the event on which the contingency is limited has taken place, the junction of the particular

estate and the reversion in a third person, is a merger and extinguishment of the contingent remainder for-ever[z].

PROPOSITION IX.

Of the Construction of Common-Law Leases.

The principal distinctions to be observed in the construction of leases which enure by the common law, (and such indeed is the case with all leases which are not strictly pursuant to the statute[a],) are, first, between void and voidable; secondly, between leases for years and life; and, thirdly, between things in grant and things in livery.

1. Between "void and voidable." If tenant in tail makes a lease for 40 years, rendering rent, and dies, this is not void but voidable, and if the issue accepts the rent it shall bind him. Why? Because the issue takes the same estate out of which the lease was originally derived; for the tenant in tail, who made the lease, was entrusted with the *jus possessionis*, "the right of possession of the inheritance;" and, therefore, the estate of the lessor continuing, the derived part or portion of it which constitutes the lessee's estate, has also continuance until the issue avoids it. And, because it is a maxim of law, that he who may defeat an estate by his entry, may equally make it good by his confirmation; the issue may, therefore, confirm this lease if he will, and, as he may make an express, so he may make an implied confirmation, as

z See Fearne's Cont. Rem. page 345. et seq. last edition.

a Stat. 32 H. 8. c. 28.

by accepting rent or the like. But otherwise it is with respect to the remainder-man and the reversioner; for these take several and distinct estates from that out of which the lease was originally derived, and, consequently, upon the determination of the estate tail, by the tenant in tail dying without issue, the unexpired lease for years becomes absolutely void, and not merely voidable. The determination of the greater is the determination of the less estate, which was but a minor part or portion of it.

2. Between leases "for years and for life." If tenant for life, as tenant in dower or by the curtesy, makes a lease for years, upon the death of the lessor this is absolutely void, and can neither be made good afterwards by confirmation or otherwise; for the freehold, out of which it was derived is determined, and the determination of the greater is the determination of the less estate. But, if such tenants make leases for life or lives, it is otherwise. Why? Because, in that case, they create greater estates than can be derived out of what they themselves have, and, consequently, as those leases are derived, not out of the estate of the lessor alone, but out of the two estates of the lessor and the reversioner together, it follows, that the reversioner may either defeat them or not, upon the death of the lessor, as he thinks fit.

3. Between things "in grant," and things "in livery." If the bishop, with confirmation of dean and chapter, makes a lease which is not strictly pursuant to the statute, and therefore operates as a common-law lease, of things in livery, whether for life or lives, or for years, this is not void but voidable; and if, afterwards, the successor accepts the rent, he makes it good and unavoidable. Why? Because the bishop, who made the lease, was entrusted with the *jus possessionis*, "the right of

possession of the inheritance," and therefore the estate, out of which the lease was derived, has continuance still; and then, according to the legal maxim, "that he who may defeat by his entry, may equally make good by his confirmation," if the successor accepts the rent he necessarily confirms the lease; and, by so doing, he has also waved taking advantage of the statutes which were enacted for making void such leases, because those statutes were made wholly for the benefit of the successor, against the predecessor's acts, and not against the successor's own acts. And, possibly, (says the law,) the reserved rent may be more beneficial to the successor than the land itself. But, if a lease be made for life or lives, of things in grant, as of tithes, or other incorporeal heriditaments, the lease is absolutely void upon the death of the lessor, and not merely voidable; and this is the reason which is assigned for it, viz. that there was anciently no remedy, at the common law, by which the rent, in such case, could be recovered by the successor, if afterwards denied: he could not distrain, for there was nothing of which a distress could be taken; and an action of debt would not lie, because, the lease being for life or lives, no action of debt was maintainable till after the lives ended; and, therefore, since the acceptance of the rent at one day, would not, at the common law, have enabled him to sue for it if afterwards denied, it was held to be unreasonable that he should be bound by such acceptance; and herein consists the principal distinction between the common law, and the law as it stands at this day upon the statutes (1). And as it is of the bishop,

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(1) Voidable leases may be equally made good, whether by accepting rent, or by distraining for rent due at the death of the predecessor, or by bringing an action of waste against the lessee;

in such cases, so it is of the dean, the archdeacon, the prebendary, and the like; for these are all "seised" *jure ecclesiæ* (2).

PROPOSITION X.

Of the Distinction between the Operation of a Fine and that of a Recovery, where the Tenant in Tail is the Reversion, and there are no intermediate Remainders.

The operation of a fine levied by a tenant in tail (1), where he has the reversion in himself, and there are no in-

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or, in case the lease be for life or lives, by bringing an assize for rent due *after* the death of the predecessor, or by acceptance of fealty from the lessee.

(2) For the learning relating to leases made by ecclesiastical persons, see Bacon's Abridgment, vol. 3. tit. Leases.

(1) The uses of a fine, in the modern practice, are, first, to extinguish dormant titles, which are barred after five years' non-claim by the statutes 18 Ed. 1. & 4 H. 7. c. 24. Or, secondly, to bar the issue in tail, under the statutes 4 H. 7. c. 24. & 32 H. 8. c. 36. Or, thirdly, to pass the estates of *femmes covertes*, in the inheritance or freehold of lands and tenements. In the last instance, the fine is supposed, by Blackstone, to be binding upon the *femme coverte, because she is privately examined as to her voluntary consent.* (Bl. Comms. 2. 352.) But, if that were indeed the principal reason, any other mode of conveyance, to which the same form of private examination were superadded, would be as binding as a fine. It seems, that the fine is binding in such case, *because it is the conclusion of a real action commenced by original writ,*" without which preliminary, even at this day, a fine would be a nullity. In the ancient practice, the recovery of the estate of the wife, in a real action, was held to be binding,

termediate remainders, is by letting the reversion into possession; but if he suffers a recovery in the like case, it operates to defeat the reversion. As for example: B. was tenant in tail by descent, with reversion to himself in fee, of certain lands, of which A. (his ancestor) had granted leases with covenants for further renewal. Now, in the first place, although the tenant in tail is empowered, under the enabling statute, (32 Henry VIII. c. 28) to grant leases for twenty-one years, or three lives, pursuant to the directions of the statute, he has plainly no power, either by the statute or by the common law, to bind the issue in tail to a further renewal, and, consequently, whatever covenants A. might have made to that effect, they could not be binding upon the heir in respect of the estate tail (2). Secondly, with respect to the reversion in fee, which also descended at the same time from A. to B. this was "*hæreditas infruc-*

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notwithstanding the coverture. Upon the same principle, the fine is held to be binding in the present instance, because of the supposed depending of a real action, of which the fine is an amicable composition by agreement; and not because of the form of private examination, which is only a circumstance in the mode of levying the fine, and a merely secondary incident introduced to prevent compulsion. And although fines and recoveries are now no more than *feigned* proceedings, or, as they are usually called, *common assurances*, yet, in point of bar and conclusion, they are still governed by the same principles as if they were really adverse suits. See the note 171. to Litt. 121. a.

(2) The reason is, that the heir in tail, although he comes to the estate tail by descent, yet takes as a purchaser, "*per formam doni*, and, consequently, is not chargeable with the incumbrances of his ancestor, as when he takes by descent at the common law.

tuosa," as long as the estate-tail subsisted; and although the covenants of the ancestor are said to descend as an *onus* upon the heir, whether he inherits any estate or not, yet they lie dormant, and are not compulsory until he has assets by descent from or through that same ancestor. But a reversion, or a remainder expectant upon an estate tail, is not assets, because it is always in the power of the tenant in tail in possession, to bar it at his pleasure (3). Let us then suppose, that, under these circumstances, B levies a fine with proclamations, under the statute 4 H. VII. c. 24. and 32 H. VIII. c. 36. (which is said to be the mode usually resorted to in such cases where there are no intervening remainders[a],) for the sake of quieting the possession, or in order to prepare for making a new settlement. Now, by the operation of the fine, in the first instance, the conusee takes a fee simple qualified, determinable upon the death and failure of issue of the tenant in tail, and which is afterwards reconveyed by the deed to lead the uses of the fine to B. himself, who, consequently, becomes tenant of the fee simple qualified, together with the old reversion to himself in fee simple absolute. But it is a maxim of law, that where two estates in succession are vested in the same person, the less estate always merges in the greater; and though an estate-tail does not merge because of the statute *de donis*, which would otherwise be of no effect, there is no such exception with respect to the qualified or base fee extracted out of the estate-tail, and which therefore instantly merges in the old reversion in fee simple; and, consequently, the *hæreditas infructuosa* being now re-

a See Bl. Comms. 2. 363.

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(3) The power of alienation by fine and recovery is an inseparable incident to an estate tail. See Co. 224. a. and note 132.

duced into possession, the heir has assets by descent, from the same ancestor who entered into the covenants, and is of course bound by those covenants. And so it was adjudged in the case of Kellow *versus* Rawden[b]: the reversion in fee, expectant upon an estate-tail in possession, was not assets; but no sooner was the estate tail become extinct, and the reversion vested in possession in the heir, by the operation of the fine, than it thereupon became assets, and liable to all the incumbrances of the ancestor.

We have here, then, the principle upon which the fine operates to let the reversion into possession, and to make the heir chargeable in such case, in respect of assets descended, who was not so before. But, in the case of a recovery, it is otherwise. Why? Because the estate conveyed by the recovery, is that of fee simple absolute, of which the recoveror acquires seisin, not by compromise, as in the case of a fine, but by adjudication of an adverse possession grounded upon an older and better title; and, consequently, the operation of the recovery is to defeat the reversion, together with all the mesne estates and incumbrances, precisely in the same manner as if the recoveror had actually recovered in a really adverse suit.

PROPOSITION XI.

Of the Distinction between single and double Voucher.

In the case of a recovery with single voucher, supposing the præcipe upon which the recovery is grounded to

b Carthew, 129.

be brought immediately against the tenant in tail himself, who appears and vouches over the common vouchee to warranty, it is then the estate tail of which he is actually seised at the time which is defeated, and, consequently, remainders and reversions, together with all latent droits and interests, are not barred. Secondly, if the tenant in tail levies a fine, as he usually does, preparatory to the recovery, now the estate tail being thus divested by the operation of the fine, the recovery which is had thereon is no longer of the old fee tail, but of the new fee simple, which has been extracted out of it. In this case, however, as well as in the former, a sufficient recovery cannot be had with single voucher, but only with double voucher at least, though not exactly for the same reason; for, in the former case, in which the recoveree or tenant to the præcipe was actually seised, at the time of an estate tail, the recovery was necessarily of that estate and of nothing more; but, in the latter case, in which the estate tail was previously divested or discontinued by the fine, and turned to a droit, the recoveree or tenant to the præcipe, had fee simple, the recovery of which is good against him by way of estoppel[a], but, upon his death, may be avoided by the issue, by defeating the discontinuance under which it was created. As for example; when the tenant in tail levies a fine, it operates, in the first instance, as a discontinuance(1). Suppose, then,

a Co. Litt. 352. a.

(1) A fine, at the common law, or without proclamations, enures as a feoffment upon record, of which it is virtually the acknowledgment. It is only in the special case of a fine being levied with proclamations, under the stat. 4 H. 7. c. 24. and 32 H. 8. c. 36. that the issue in tail is barred by force of those statutes. Co. Litt. 262. a. Ibid. 372. a. And see the note 171 to Co. Litt. 121. a.

the estate created under the discontinuance to be immediately reconveyed to the tenant in tail himself, who, thereupon, suffers a recovery. Now it is clear, that this recovery is not of the estate-tail, but of the estate created under the discontinuance. By the same rule, then, if the heir in tail defeats the discontinuance, (which he may well do by action, though not by entry,) the discontinuance being defeated, the tortious fee simple, which the discontinuance gave rise to, is necessarily determined, and, consequently, the recovery avoided[b]. But where the tenant in tail is brought in as vouchee to the warranty, as in the case of a recovery with double voucher, the heir is then barred by the warranty, and so are all they in remainder or reversion. For the law always supposes, upon a principle of equity, that the first vouchee recovers other lands of equal value against the second vouchee, which descend in *the same course of inheritance* as the estate passed by the recovery would have descended. Upon this presumption of law, which is uniformly admitted in order to give effect to common recoveries, the warranty of the ancestor not only binds the heir, and bars every latent right and interest he may have in the lands recovered, but also defeats, at the same time, the remainders over. But, where the ancestor has entered into no such warranty, (with double voucher,) there is evidently no bar to the heir, so as to preclude him from his latent droit in tail, which is *above* the recovery. And so in all cases, where there are several and distinct estates *above* the estate passed by the recovery, it is necessary that the parties should be all severally vouched to warranty in order to ensure a good title (2).

b Co. Litt. 389. a.

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(2) For further information on this subject, see the Essay on Fines and Recoveries, by Mr. Cruise.

PROPOSITION XII.

Of the Distinction between contingent Remainder and conditional Limitation[c].

The distinction between a contingent remainder, and a conditional limitation, is simply this; viz. that the former waits the regular expiration of the preceding estate, and then vests in possession as the corresponding part or portion of the same fee; but the latter vests in possession in extinction or defeasance of the preceding estate, and before the period originally marked out for the expiration of the same. Thus, if lands are limited to A. for the life of B. or so long as B. shall live, and in the event of B.'s death, in the life-time of A. then to C. in fee. Now, in this case, C. has a contingent remainder. But if the limitation were to A. for life, or, which, in effect, is the same thing, to A. generally, provided nevertheless, that in the event of B.'s death, in the life-time of A. that then the land shall go over to C. in fee, this is no longer a contingent remainder to C. but a conditional limitation. Why? Because, in the first case, in which the preceding estate was originally limited to A. for the life of B. and no longer, the remainder, which was limited in contingency to C. in fee, must necessarily wait the regular expiration of the preceding estate, out of which or after which it was limited. But here, on the contrary, the qualifying or determining expressions, forming no part of the original limitation, but being annexed thereto in the nature of a collateral or distinct *proviso*, and by which the preceding estate, is to be abridged, defeated, or nullified, it is evident that the estate, which is limited in contingency to C.

c See the note 94, to Co. Litt. 208. b.

in fee, may vest in possession before the period originally marked out for the expiration of the preceding estate; and, consequently, such limitation over is not a contingent remainder, but a distinct conditional limitation (1).

PROPOSITION XIII.

Of the Distinction between transitory and local Actions.

The distinction between transitory and local actions, is founded on the distinction which the law takes between pr vity of contract, which is personal, and therefore transitory, and privity of estate, which is not personal, but local. Thus, if an action of debt or covenant for rent, or repairs, &c. is brought by the lessor against the lessee, this is a transitory action, and may be brought in any county; but, if brought by the lessor against the assignee of the lessee, the action is then local, and must be brought in the county in which the land lies, and in no other. Why? Because between the lessor and the lessee there is privity of contract, which is always of a transitory nature. *Debita et contracta sunt nullius loci.* But, if the lessee assigns the term, and afterwards the

(1) The reason, that every "remainder" must be so limited as to wait for the determination of the particular estate, before it takes effect in possession, and cannot take effect in prejudice or exclusion of the preceding estate, is, that if such remainder should be good, then would it give an entry to him who had no right before, which would be against the express rule of law, "that an entry cannot be given to a stranger." See the Commentary on Richel's Case, in the chapter upon Warranties, Co. Litt. 377. b. *et seq.*

lessor brings an action of debt for the rent arrear, against the assignee, the action is then brought in respect of the land, upon the privity of estate alone, and not of contract. For the privity of contract, which subsisted between the lessor and the lessee, was destroyed by the assignment. And so it is where the assignee of the reversion brings the action against the lessee, or the assignee of the lessee, for the same reason. For the statute 32 H. VIII [a]. only transfers the same privity to the assignee of the reversion, which the lessor himself had or might have had; and which, after assignment, is therefore privity of estate alone, and not of contract. And so, again, on the other hand, if an action of covenant is brought by the lessee, against the lessor, it is founded in the personal privity between the parties, and is therefore transitory; but, if brought by the assignee of the lessee, or against the assignee of the reversion, the privity of contract being determined by the assignment, the action is founded in the privity of estate alone, and is consequently local; and yet, in both cases, the plaintiff sues for damages, &c. affecting land.

PROPOSITION XIV.

Of the Distinction between Debts and Contracts, with respect to Tender and Refusal.

If the defendant, in an action of debt on bond or other specialty, pleads a tender and refusal, according to the condition, &c. he must also plead the *encore prêt*, that is to say, that he is still ready to pay, or bring the money into

[a] Co. Litt. 215. a.

court. For this is, *primâ facie*, a debt which remains still unsatisfied. The very condition upon which the defendant relies, in this instance, is itself evidence of the debt: *et liberata pecunia*, says the law, *non liberat offerentem*[a]; for it might possibly have been delivered for some special purpose, or upon some other account. But if the obligee has made a deed of defeasance to the obligor, upon condition, &c. the obligor, after tender and refusal, may plead the same without the *encore prêt*; for this is, *primâ facie*, not a debt, but a contract in the nature of a conditional release, and the defendant having performed his part by the tender, the condition is now satisfied, and the release become absolute and unconditional[b].

Upon the same principle, if the obligee accepts a recognizance from the obligor, with condition to be void upon the payment of a smaller sum on a certain day, and, on the day fixed, the debtor tenders and the creditor refuses the same, he can never afterwards recover either the one sum, or the other. For the original debt was satisfied by the recognizance, and now the recognizance itself is satisfied by the tender and refusal. For this is, *primâ facie*, not a debt, but a contract, of which tender and refusal are always equivalent to performance[c].

So, again, in the case of a pledge or pawn; the pawner, after tender and refusal, may either bring an action of assumpsit, and declare that the defendant promised to return the goods upon request, or he may bring an action of trover, for the property is vested in him by the tender; which proves, that it is, in effect, the same thing, whether the money is tendered and refused, or actually paid[d].

a Co. Litt. 207. a.
b Co. Litt. 207. a.
c Co. Litt. 207. a.
d Cro. Jac. 243. Yelv. 149. 1 Bulstr. 99.

In the same manner, where a feoffment is made upon condition for the payment of a collateral sum, if lawful tender be once refused, he, who ought to tender, is of this quit, and fully discharged ever afterwards[e].

And so in all cases, in which the obligor is to do some collateral thing, as to deliver a horse, &c. if the obligor offers to do his part, and the obligee refuses, the condition is performed in law, and the obligation discharged for ever[f].

The creditor may also totally lose his money, if after tender and refusal, he takes issue upon the tender, and it is found against him[g].

PROPOSITION XV.

Of the Joinder and Misjoinder of Actions.

THERE are two principal points to be considered in the joinder of actions: 1. whether they can be answered by the same plea, and 2. whether they admit of the same judgment. If A. brings an action upon the case against B. upon a general assumpsit, or an indebitatus assumpsit upon a simple contract debt, he may also declare, in the same count, upon an *insimul computassent*, money lent, money had and received, and so forth; for *non assumpsit* may be pleaded as the general issue to all these counts. But, if the action be for trover or trespass, and the plaintiff

e Co. Litt. 209. a. b.
f Co. Litt. 207. a.
g Imp. Prac. 199.

add the same counts, there will then be two general issues required, that is to say, "not guilty," to the former, and "non assumpsit" to the latter; which is contrary to an established rule in pleading, "that the pleadings ought to be single and containing one matter;" for duplicity begets confusion. This general rule, however, admits of some qualification; for an action of debt on bond, or other specialty, and an indebitatus assumpsit, may be joined in the same count, though the plea of general issue to the former is *nil debet*, and *non assumpsit* to the latter. But the reason is, that they contain only one matter, and the judgment is the same in either case; that is to say, for the debt and damages. But, when the pleas are so essentially different, (as, for instance, in the case of torts and contracts,) that they require different verdicts, there can be no joinder of actions. 2. Whether they admit of the same judgment? For, where the judgment is for the plaintiff in an action for an injury without force, as case, assumpsit, debt on contract, or the like, *it is also considered that the defendant be amerced for his wilful delay*, &c. But in actions for torts, or forcible injuries, the judgment is, "that he be taken *(capiatur)* until he make fine," &c. And, although the fine is now remitted by the stat. 5 and 6 W. & M. c. 12. the form still continues; a *misericordia* or amercement is entered, in the one case, and a *capiatur* in the other. Supposing, then, there were two judgments, the court would not know whether to enter the *misericordia* or the *capiatur*.

The next point for our consideration is, to know how to determine with respect to the parties who are required to join, or to be joined in the same action. And here it becomes necessary to distinguish, first, whether they are plaintiffs or defendants; for, in all matters of contract, if there are several plaintiffs, and only one brings the

action, it is a *material* defect of which the defendant will be allowed to take every advantage, whether upon general demurrer or otherwise. But where there are several defendants, and they are not joined, it is a defect in *form* only, and consequently no advantage can be had of it, but by pleading specially in abatement, pursuant to the stat. 27 Eliz. c. 5. For example, if there are two obligees, and only one brings the action, it may be given in evidence in bar upon the general issue; but not *vice versâ* if there are two obligors, and only one is proceeded against: for, in the first case, there would be an apparent variance between the deed declared upon, and the deed given in evidence; a contract with two, and a contract with one, being, *primâ facie*, two different contracts, and, therefore, not to be intended to be the same contract. Hence the general rule, that if a bond is made to several, to pay money to one of them, they must all join in the action, because they are but as one obligee; and if they do not all join, the obligor may take advantage of it, either upon the general issue, or upon general demurrer, or afterwards in arrest of judgment, or finally it will be error. And so it is in the case of covenant or contract, whether by parol or in writing. But where the obligors are several, and only one is proceeded against, this is no more than an informality, or mere defect in form; for the defendant cannot deny that the deed is his, though it is not his *sole* deed, and consequently he cannot plead the general issue *non est factum*.

2. Whether the action be for an injury which is founded in tort, or in mere breach of contract and delay of justice; for, if the action be for a mere breach of contract, the measure of the debt or damages arising out of the contract itself, may accordingly be discharged or satisfied by any one of the contracting parties, as well as by

all; and if any one of them does discharge it, it is a sufficient discharge and release of all the rest. But in actions of tort, on the contrary, the entire damages attach to each severally; for, as the guilt or wrongful act of one man is no extenuation of the guilt or wrongful act of another, so neither is the punishment or the damages to be incurred or paid by one, a satisfaction for the punishment or the damages to be incurred or paid by another.

It follows, that if several have been parties to a trespass, properly so called, the plaintiff has his election to bring an action against them all, or against any one or more of them[a]. Thus an action of trespass for conspiracy against several, may be maintained against one alone, though the others are acquitted[b]; for these actions are founded in tort. But if several are liable to a debt or contract, it is otherwise; and even if judgment is recovered jointly against several defendants, the plaintiff cannot bring an action of debt upon the judgment against one of them alone, but must sue them all jointly[c]. Upon the same principle, if an action is brought against several, upon a statute giving a penalty, only one penalty is recoverable; but when a statute gives a forfeiture, each defendant must pay the forfeiture severally; for a forfeiture is not (like a penalty) in the nature of a satisfaction to the party injured, but by way of punishment to the offender; and, though debts are joint, crimes are several[d].

a 8 Rep. 159.
b Saund. 1. c. 34.
c 2 Leon. 220.
d Cro. Eliz. 480. 1 Salk. 182.

PROPOSITION XVI.

Of the Construction of the usual Covenants and Powers in Marriage Settlements.

In the construction of the usual covenants and powers inserted in marriage settlements, it is to be observed, in the first place, that the covenants for further assurance, &c. are not against all claimants generally, but only against those who claim for or under the covenantor. Why? Because if the parties were to covenant generally, it would be necessary for them, in that case, to keep the title deeds. For, if any one is bound to warranty, so that he is bound to render in value, then is the defence of the title at his peril; and, therefore, the feoffee shall have no deeds that comprehend warranty whereof the feoffor can take advantage[a]. Secondly, the covenants are always expressly against lawful lets and interruptions, in contradistinction to unlawful or tortious entries; for, in the last case, the party has his remedy by action of trespass or ejectment against the wrongdoers; but, having no such remedy against those who claim under the covenantor himself, by a title paramount to that of the grantee, he then, and then only, may bring his action of covenant by force of these words of warranty (1). Again,

a Co. Litt. 6. a.

(1) Pursuant to the above doctrine, the plaintiff who brings this action (of covenant for quiet enjoyment, &c.) must not only allege that the person evicting him had lawful title, but that he had lawful title before the grant or lease made to the plaintiff

with respect to the powers of leasing, of jointuring, of raising portions, of revocation, &c. upon what principle is it that the reservation of these, which would be void and of no effect in a deed of feoffment, or fine, or recovery, or even lease or release, shall be valid in a deed of settlement? It is because this enures by way of declaration of the use, but those conveyances have their operation by virtue of the transmutation of the possession, the constructive differences of which have been already exemplified in the foregoing pages. Another rule to be observed is, that the respective powers and covenants must be always of the same nature, and stand well together in point of consistency. Thus, if a power of leasing were inserted in a covenant to stand seised to uses, it would be void and of no effect; because they are contracts of a different nature, the latter being always for a good consideration, such as natural affection or blood; the former for a valuable consideration, meaning money, or money's worth; and, therefore, the two together would be repugnant (2).

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for, otherwise, it might be from the plaintiff himself, that the evictor derived his title; and a conclusion of law does not help the not shewing a matter fact. He is not, however, required to set out the title "specially" of the person who entered upon him, because it is presumed in law, that every one is the depository of his own title, and that others are strangers to it.

(2) Co. Litt. 237. a. For the further construction of covenants for title, see Sugden's Law of Vendors and Purchasers. ch. 13.

PROPOSITION XVII.

Of the Assignment of Chattels "with" or "without" Deed.

An original chattel of a thing that lies properly in grant may be assigned either with or without deed; and so likewise may a chattel derived out of a freehold of any thing that lies in livery; but a chattel derived out of a freehold of any thing that lies in grant, cannot be assigned without deed. For example: while the feudal tenure subsisted, the guardian in chivalry, who had seisin of the wardship of the heir and of the lands, (as in the case Littleton puts, section 116.) could assign them both or either of them to a stranger, by deed or without deed; for the wardship was an original chattel during the minority; it was not derived out of any freehold; and, therefore, as the law created it without deed, it could equally be assigned without deed. But, if a man made a lease for years of a villein, the lessee could not assign without deed, for the same reason that the lease, under which he himself held, could not be created without deed, being derived out of a freehold of a thing in grant[a].

The first distinction to be considered, is, therefore, between original chattels, and those which are derived. Let us now take the second distinction, between a chattel derived out of a freehold of a thing in livery, and a chattel derived out of a freehold of a thing in grant.

Incorporeal hereditaments, of which no livery of seisin can be had, and which are therefore said to lie in grant, are required to be conveyed by deed; for the law (says

[a] Litt. sect. 183.

Lord Coke) has provided the deed in the stead or place of the livery (1). By the same rule, then, as the freehold of such incorporeal hereditaments cannot be created without deed, so neither can the chattel, which is derived out of that freehold, be assigned without deed. Thus, while the feudal tenure subsisted, if an advowson was held by knight's service, and the tenant died, leaving his heir within age, the lord could not grant the wardship of the advowson without deed. And, by the same rule, if at this day the patron of an advowson grants the next presentation to a stranger, he can neither do this without deed, nor can the grantee assign without deed, *because it is derived out of an inheritance which lies only in grant, and not in livery*[b]. But otherwise it is, where the chattel to be assigned is derived out of a freehold of a thing in livery; for then it will pass *without deed.* As for example: if a corporation aggregate of many, make a lease for years, they cannot do this without deed; for a corporation being an invisible body, can no otherwise act or speak than under their common seal. But the lessee may assign without deed; for it was not the quality of the thing leased, (as Lord Coke observes,) that rendered the original deed necessary, but the quality of the incorporation[c].

We may add, that the same distinction is to be ob-

b Co. Litt 85. a. c Co. Litt. 121. b. Ibid. 169. a.

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(1) Co. Litt. 9. a. Ibid. 49. a. The mistake, into which Blackstone has fallen, in describing an advowson (which is an incorporeal hereditament,) to be capable of being conveyed *by verbal grant*, has been pointed out by the learned Vinerian professor Mr. Wooddeson, and is noticed in Mr. Christian's notes to Bl. Comms. 2. 22.

served in the law of surrenders[d]. It likewise opens to the further distinction (in the law of prescription,) between prescribing by a *que estate* and prescribing *as heir*. For if a man prescribes by a *que estate*, (in himself and those whose estate he hath,) he can only claim those things which may pass *without deed* as incidents to that estate, such as an advowson appendant, or common appurtenant, or the like; but for those things which *cannot be granted without deed or fine*, as an advowson which is a distinct inheritance, or common *in gross*, and the like, he must prescribe as heir, (in himself and his ancestors,) because the heir claims by descent, without any conveyance[e].

PROPOSITION XVIII.

Of the ulterior Application of the Doctrine of Attornment, in the Construction of Releases per elargir le Estate.

A RELEASE *per elargir le estate*, is generally no more than a grant of the reversion, in whole or part, to him who, at the common law, had the right to attorn to such grant if made to a stranger; and wherever a release is so made "to the tenant who, at the common law, had the right to attorn, &c." it will (I apprehend) be found to be a good release *per elargir son estate*, if made by him who is next in the reversion.

For example: if A. leases to B. for life, who leases to C. for years, and afterwards A. releases to C. and his heirs, this is a void release, and of no effect. For it was not C.

d Co. Litt. 338. a. But see the note 295. ibid.

e Co. Litt. 191. a.

but B. who had the right to attorn to A.'s grant of the reversion to a stranger; the releasee's estate being derived, in this instance, not out of the releasor's estate, but out of that of the lessee for life, B.[a]

Again; if a man make a lease for 20 years, and the lessee make an underlease for 10 years, and afterwards he who made the first lease release to the second lessee and his heirs, this is also a void release for the same reason[b].

But if A. lease to B. for years, remainder to C. for life, he may afterwards release either to B. or C.; for either B. or C. might have attorned, at the common law, to A.'s grant of the reversion to a stranger, B. as immediate tenant of the term, C. as immediate tenant of the freehold[c].

Again; if A. leases to B. for life, remainder to C. for life, the consent of B. to a portion of the reversion being originally vested in C. comes in place of his attornment, and a release in such case from A. to C. is therefore a good release, though B. is immediate tenant of the freehold[d].

Again; if A. leases to B. for years, and B. enters, and afterwards assigns over for the whole term to C. a release from A. to C. is a good release *per elargir, &c.* For C. being accepted by A. as his tenant, acquires the right to attorn to A.'s grant of the reversion to a stranger.

But though it is true that this species of release was generally so made to him who, at the common law, had the right to attorn, &c.; yet there are some cases in

a Co. Litt. 273. a. and see Co. Litt. 311. a.
b Ibid.
c Co. Litt. 273. a. and see Co. Litt. 311. a.
d Ibid.

which it is valid, though made to him who had not that right: as a release made to a tenant at will, which is equally a good release *per elargir &c.*[e] though a tenant at will, because of the smallness of his estate, had not the right to attorn to the grant of his lessor at the common law[f]. But, it is to be observed, that there is no other intervening tenant, in this case, who had the right to attorn, and, therefore, whose assent was formerly necessary to the confirmation of the grant in question.

Setting out, then, with this general principle, it seems to follow, that a release made to a "tenant by *elegit*," is equally a good release *per elargir son estate*, if made by him who is next in the reversion; though I venture to bring forward this opinion in opposition to the doctrine laid down in the note to Co. Litt. 273. b. where it is said to be void, because there is no privity. Let us now endeavour to consider this question.

Privity of estate or tenure, (as between lord and tenant,) may be reduced to two general heads,—privity in deed, and privity in law[g]. If A. leases to B. for life, and afterwards grants the reversion to C. and B. attorns, the tenant of the land and the grantee of the reversion, are privies in deed. But, if there be lord and tenant, and the tenant lease to another for life, and afterwards die without heir, so that the reversion escheats to the lord, the tenant of the land and the lord are now privies in law[h]. And why, then, is there not privity "*of tenure in law*," between the owner of the land, and the tenant by statute merchant, statute staple, or elegit? The latter, indeed, "before entry," cannot take a release *per elargir* &c. and so neither can the lessee for a year at the com-

e Co. Litt. 270. b.
f Co. Litt. 62. a.
g Co. Litt. 271. a.
h Termes de la Ley, 223.

mon law, and precisely for the same reason, because they are not possessed before entry; but, no sooner is the possession vested by entry, than they have each of them an estate in the land, which in either case is a derived portion of that of the reversioner, and the two together make but one and the same estate in law (1).

But, it is said, the tenant by *elegit* is not strictly tenant to the owner of the land, as the lessee is tenant to the lessor; for it is not under the owner of the land he holds, but under the statute. And what is that to the purpose? There is privity in law, as well as privity in deed; and of this there are many other examples, wherein it subsists in like manner between the tenant and the reversioner, though the tenant does not hold of him as his tenant. Thus there is "privity" between the heir and the tenant in dower; and yet, the tenant in dower does not hold of the heir as his tenant, for it is not under the heir she claims, but under the husband; which is thus demonstrated in Littleton:—

"A. disseised by B. who (after five years' peaceable possession, as required by the stat. 32 H. VIII. c. 33.) dies seised, and the land descends to his heir D. who en-

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(1) A release *per elargir le estate*, if made to a lessee of a chattel, who has never entered, is void at the common law, because, "before entry," he has no estate in the land, but only an interest in the term. But, by the words "bargain and sale," since the stat. 27. H. 8. c. 10. (of uses), he is held, by analogy of construction of that statute, to be "seised" as bargainee of the use, the "seisin" being executed by the statute; and, having thus possession, as well as privity, he is able to take a release *per elargir son estate*, and his acceptance of the release is an implied attornment. Co. Litt. 270. a.

dows his mother of one third. A.'s right of entry upon the two-thirds against the heir, is taken away by the descent, but he may well enter upon the widow for her third. Why? Because she claims under the husband, during whose life her title of dower was initiate. But suppose A. does not enter, and afterwards, upon the death of the widow, the said third descends to the heir D.; A. may still enter upon D. for that third. Why? Because the fee and freehold did not descend at the same time to the heir, but only a reversion upon the death of B. expectant upon the death of B.'s widow[g]."

The relation, therefore, between the widow and the heir, is not exactly as Blackstone states it[h], "that the widow is immediate tenant to the heir," for it is not under the heir she claims, but under the husband. The usage of the dower being assigned by the heir, is upon a quite different principle. This was, originally, a merely feudal ceremony, introduced for no other purpose than that of making the heir liable to the lord, in respect of those lands, for the payment of the feudal fines and services, for which, by the feudal constitution, the female could not be called upon. But, though the widow does not exactly hold of the heir, as his tenant, there is, nevertheless, a sort of *quasi tenure*, which, in the language of the law, is called *an attendance*, and which implies a subsisting relation as between lord and tenant, and, consequently, a *subsisting privity*, which is always an inseparable incident to every species of tenure; and the widow was, therefore, liable to an action of waste, at the suit of the heir, and compellable to attorn in a *quid juris clamat* to the heir's grant of the reversion to a stranger[i].

g Co. Litt. 240. b. 241. a.
h Bl. Comms. 2. 136
i Co. Litt. 316. a.

Again; there is the like privity between the heir and the tenant by the curtesy: for the tenant by the curtesy does not claim under the heir, but by act and operation of law, and consequently he is not strictly tenant to the heir. But, if the tenant by the curtesy commit waste, the heir may have an action of waste against him; and, like the tenant in dower, he was also compellable to attorn in a *quid juris clamat* to the heir's grant of the reversion to a stranger[k].

Again, while the feudal tenure subsisted, if the guardian in chivalry held over for the value, and afterwards, the heir, being of full age, released to him all the right, &c. this also was a good release *per clargir son estate*[l]; and yet the interest of the guardian in chivalry, like that of the tenant by elegit at this day, was created no otherwise than by act and operation of law. The tenant by elegit too, (like the guardian in chivalry,) has only a chattel interest, and, therefore, cannot take a release before entry[m]; but, where a man has once the possession given him by the act and operation of law, the law gives him equally the required privity as a necessary appendage to it, which is very observable, (says Lord Coke,) as a conclusion in other cases[n].

I apprehend it to be a general rule of law, "that wherever the law creates estates, it creates, at the same time, all the requisite incidents to those estates." *In constructione juris semper consistit æquitas.* Thus, if A. leases to B. for years, and afterwards ousts B. and enfeoffs C. and afterwards B. enters upon C. and commits waste, C. may have an action of waste against him[o]. Why? Because

k Co. Litt. 273. a. 316. a.
l Co. Litt. 82. b. 271. a. 273. b.
m Co. Litt. 270. b. 38. b.
n Co. Litt 272 b.
o Litt. sect. 576.

when B. entered upon C. claiming his term, he vested the reversion in C. without attornment, and, thereupon, the law created the required privity between them, without which the action of waste could not lie.

Again; if A. leases to B. for life, who leases to C. for 40 years, and C. obtains possession under the lease, and afterwards A. confirms the same, and B. dies within the term, A. cannot enter upon C. during the remainder of the term[p]. Why? Because A. having confirmed the term in the life-time of B.,—upon the death of B., C.'s lease is derived out of A.'s estate, and if, afterwards, the rent is in arrear, A. may distrain, or have an action of debt, &c.; or, if C. commits waste, A. may bring an action of waste; for, no sooner is the privity of estate determined between B. and C. by the determination of B.'s estate for life, than the law creates the same privity of estate between A. and C.; and, by the same rule, if, *afterwards*, A. releases to C. it will be a good release *per elargir*, &c.

Again, if A. leases to B. a woman, for life, and afterwards B. intermarries with C. and afterwards A. releases to C. and his heirs, this is a good release *per elargir*, &c.[q]; for, by the intermarriage, C. acquired the freehold in the right of the wife, and, thereupon, the law created the requisite privity between A. and C. upon which the release from A. to C. might operate *per elargir*, &c.

The release of the wife to the lessee of the husband, after the death of the husband, who, being seised in the right of the wife, had created an unexpired term, was equally a good release *per elargir*, &c. though the wife

p Co. Litt. 296. a.

q Co. Litt. 273. b.

was not party to the lease, for the same reason[r]; for the lease was not void by the death of the husband, but only voidable by the entry of the wife; for the husband had the *jus possessionis*, "the right of possession of the inheritance," in the right of the wife[s]. But that which I may defeat by my entry, I may equally make good by my confirmation[t]. By the same rule, then, the wife may confirm this lease if she will, and as well by an implied as by an express confirmation; and, thereupon, the lessee becomes liable to the rent reserved by the husband, and the wife may either distrain for the arrears, or bring an action of debt; or, if the lessee commits waste, may have an action of waste, &c.

"But the owner of the land cannot bring an action of waste against the tenant by *elegit*." I grant it. And so neither can the heir against the guardian in socage; and precisely for the same reason, because the law has provided another remedy, namely, by action of account or trespass[u].

Also, while attornment was necessary, if the owner of the land had granted the reversion by fine, he might have compelled the tenant by elegit to attorn in a *quid juris clamat*, which is itself evidence of privity of estate, and of notoriety of possession[x].

Upon the whole, then, I conclude, with all due deference, that although the tenant by *elegit* is not strictly tenant to the owner of the land, there is, nevertheless, *an attendance* or *quasi tenure* between them, which has privity of estate annexed to it, as an inseparable incident; and, consequently, if the owner of the land releases *gene-*

r 1 Bac. Abridgm. 302 3 Bac Abridgm. 305. Plowd. 137. Cro. Jac. 339.
s Vide ante, prop. 5.
t Co Litt. 300 a.
u Co. Litt 54. a.
x Co. Litt. 311. a. 312. a. 315. b.

rally to the tenant by *elegit*, it will be a good release *per elargir son estate* from a chattel to a freehold; for the law supplies the required privity between the parties[z].

PROPOSITION XIX.

Of the ulterior Application of the Doctrine of Warranty, in Explanation of the Responsibility of the Heir in respect of Assets by Descent, and the consequent Distinction which the Law takes between a real and personal Lien, and real and personal Execution.

The doctrine of the responsibility of the heir in respect of assets descended, seems to proceed upon the same general principles as that of the recovery in value, against the heir, which the warrantee was entitled to, if evicted, in the case of the descent of a warranty. The argument is *à majori ad minus*. For, if the heir is not bound in the case of a warranty, which is of the realty, *á fortiori*, he shall not be bound in the case of debts and contracts, by which the realty is not originally affected[a]. Accordingly, no estate is chargeable in the hands of the heir, as assets by descent, which is not of equal value or more at the time of the descent; for, otherwise, the heir may plead "*nul assets*." Secondly, it must come by descent to the heir, and not by purchase or gift. Thirdly, it must be of fee simple, and not in tail; for the heir in tail takes *per formam doni*, as a purchaser, and an estate for another man's life is only chargeable since the statute 29 C. II. c. 3. Fourthly, it must descend to him as heir to the same ancestor who made the warranty, or other charge upon the estate. Fifthly, it must be of lands, or tenements, or rents, or services valuable, or other profits issuing out of lands or

[z] Co. Litt. 370. b. 273.b. [a] Co. Litt. 386. a.

tenements, and not of personal inheritances, as annuities and the like. Sixthly, it must be in estate or interest, and not in mere right or title. Thus, at the common law, there were no assets of what was anciently an use, and which we should now call a trust, till the *cestui qui* trust was made liable by the statute 29 C. II. c. 3. Neither is the heir chargeable in respect of a right of action, or right of entry, or the like, for these are not assets until they are brought into possession[b].

Again, it is a maxim of law, that every warranty doth descend upon him that is heir to him who made the warranty by the common law; which opens to the established distinction between a real and personal lien, and real and personal execution, viz. that the latter shall survive, and not the former.

Thus, if a man infeoffed another of an acre of land with warranty, and had issue two sons, and died seised of another acre of land of the nature of borough-english, and, afterwards, the feoffee was impleaded, although he might vouch both the sons equally, the eldest son as heir to the warranty, and the other as heir to the land, yet he could not vouch the younger son alone, because he was not heir at the common law, upon whom the warranty descended; and, if he should vouch the eldest son alone, then would he not have the benefit of his warranty, namely, a recovery in value. And the reason, that the special heir in such case cannot be vouched alone, is, that in the event of there being a warranty paramount, he would not be able to deraign that warranty, and have the recompense in value. But where the heir at the common law, and the special heir, are vouched together, so may they also vouch over together, and the recompense in value shall enure according to the loss[c].

b Co. Litt 374. b. c Co. Litt. 376. b

We have here then the ground of an established distinction in law between a real and personal lien, viz. that the real lien, as the warranty, doth ever descend upon the heir at the common law; but the personal lien doth bind the special heir, as all the heirs in gavelkind, and the heir on the part of the mother in borough-english[d].

Accordingly, if two men make a feoffment in fee with warranty, and the one die, the feoffee cannot vouch the survivor alone, without also vouching the heir of the deceased feoffor equally; but if two jointly bind themselves in an obligation, and the one die, an action of debt will lie against the survivor alone, *causâ quâ suprà*. And so it is of an execution. As, if a judgment in debt be had against two, and the one die, the plaintiff may have a *fieri facias*, which is a personal execution, and charge the survivor alone; but if he take out execution by *elegit*, that is to say, "upon the real lien," he cannot charge the survivor alone, without also charging the heir of the deceased equally, and the *scire facias* must be sued out against both[e].

PROPOSITION XX.

Of the Necessity of explaining by Discussion, in order to render the Doctrines of the Institute intelligible to Beginners.

The reader will recollect, that the proposed conclusion has been already in part demonstrated, by the remarks

d Co. Litt. 386. b.

e See Saunders, vol. 2. page 56. note 4. and the authorities there cited.

which have been offered in the course of the preceding pages. 1st. Upon the apparently immethodical, abrupt, and digressive style of the Institute; 2. upon its characteristically technical, compendious, and pithy text; and, 3. upon the multiplicity of its hitherto uncorrected textual errors and mutilations. It is still more conspicuously demonstrated in the inherent difficulty of the specific doctrines and propositions themselves, which constitute the subject-matter of the Institute, and which, from the variety of learning they contain, from their extensive and complicated combination, and above all, from the frequent technical and no less subtle distinctions, upon which they often essentially depend for their construction, it would be beyond the efforts of the most Herculean annotator to render so clearly intelligible to the student, as to do away the necessity of all further collateral explanation and discussion.

As for example: Lord Coke says, "if a man give lands to a man and his heir, in the singular number, he hath but an estate for life; for his heir cannot take a fee simple by descent, because he is but one; and, therefore, in that case, his heirs shall take nothing[a]." Now, upon turning to the note (45), which is here referred to, we read, that "according to many authorities, "heir" may be *nomen collectivum*, as well in a deed as a will, and operate in both in the same manner as "heirs" in the plural number. So far, then, the student will be able to apprehend that Lord Coke's distinction has been since done away by later decisions; but, in order that he may rightly understand that the words "heir" and "heirs" have not exactly the same operation, (as might probably be inferred from hence,) I presume it may be further necessary to explain,

[a] Co. Litt. 8. b. Ibid. 22. a.

that the word "heir," in the singular number, where words of further limitation are superadded, operates as a word of purchase; but if the word be "heirs" or "heirs of the body," in the plural, in that case even words of limitation engrafted on them, and not inconsistent with the nature of the descent pointed out by the first words, will not convert them into words of purchase[b].

Again; "if the ancestor takes an estate of freehold, and after a remainder is limited to his right heirs, these words (his right heirs) are, in this case, words of limitation, and not of purchase. But otherwise it is, where the ancestor takes only an estate for years and not of freehold; as if a lease for years be made to A. the remainder to B. in tail, the remainder to the right heirs of A. there the remainder vesteth not in A. but the right heirs shall take by purchase, if A. dies during the estate-tail: for as the ancestor and the heir are correlative of inheritances, so are the testator and executor, &c[c].

Now, the reason to be assigned for the above distinction, is not as it is here stated, "for as the ancestor and the heir, &c." On the contrary, this is a totally distinct proposition, and has nothing to do with the preceding: and, therefore, instead of "for as the ancestor," &c. we should read, "and as the ancestor," &c. The reason is as follows: If the ancestor takes an estate of freehold, and after a remainder is limited to his right heirs, then, by a rule of law of great antiquity, (commonly called the rule in Shelley's case,) the inheritance is held to be immediately executed in the ancestor[d]. But otherwise it is, if the ancestor takes only an estate for years. Why? Because, in this case, he has not the legal possession or "seisin"

b See Fearne's Cont. Rem. p. 181.
c Co. Litt. 319. b.
d See Fearne's Cont. Rem. p. 28.

of the land, which is always in him who hath the freehold[d]; and, consequently, having no part or portion of the inheritance, the two estates cannot unite and knit together, as in the preceding instance[e].

Again, we read, "if the father maketh a lease for years, and the lessee entereth and dieth, the eldest son dieth during the term before entry or receipt of rent, the younger son of the half-blood shall not inherit, but the sister; because the possession of the lessee for years is the possession of the eldest son, so as he is actually seised of the fee simple, and, consequently, the sister of the whole-blood is to be heir. The same law it is, if the lands be holden by knight's service, and the eldest son is within age, and the guardian entereth into the lands. And so it is, if the guardian in socage enter[f]."

Having corrected the mistake in the statement of this proposition, (as has been already pointed out[g],) I should explain Lord Coke's meaning to be, that "if lands are held under a lease for years, and the lessee has entered under his lease, the heir will be considered as having a *seisin in deed*, before entry, or receipt of rent;" because the possession of the lessee for years is *his* possession. Thus, if a father makes a lease for years, and the lessee enters, and the eldest son (having succeeded his father) dies during the term "before entry or receipt of rent", the younger son of the half-blood shall not inherit, but the sister; because the possession of the lessee for years is the possession of the eldest son, to whom, upon the death of the ancestor, the inheritance descended, so as he is actually seised of the fee simple; and, consequently, the sister of the whole-blood is to be heir. And so it was, while the

d Co. Litt. 46. a.
e See the note (65) to Co. Litt. 184. b.
f Co. Litt. 15. a.
g Vide ante, page 115.

feudal tenure subsisted, in the case of the guardian in chivalry; and so it is, at this day, in the case of the guardian in socage. The possession of the guardian is the possession of the ward, who thereby acquires an *actual seisin* without entry. For example: if a widow, having a son to whom her husband's estate descends, continues in possession after her husband's death, the law will consider her as guardian in socage to her son, and will therefore admit the son to have had, by this means, a *seisin in deed* of the land[h].

Again; let us take Mandevile's case:—"John de Mandevile, by his wife Roberge, had issue Robert and Maude. Michael de Moreville gave certain lands to Roberge and to the heirs of John Mandevile, her late husband, on her body begotten, and it was adjudged that Roberge had an estate but for life, and the fee-tail vested in Robert, (heirs of the body of her father being a good name of purchase,) and that when he died without issue, Maude, the daughter, was tenant in tail, as heir of the body of her father, *per formam doni*, and the formedon which she brought supposed *quod post mortem præfutæ Robergiæ*," &c. And yet, in truth, the land did not descend unto her from Robert, but because she could have no other writ, it was adjudged to be good. In which case it is to be observed, that albeit Robert, being heir, took an estate-tail by "purchase," and the daughter was no heir of his body at the time of the gift, yet she recovered the land *per formam doni*, by the name of heir of the body of her father, which, notwithstanding her brother was, and he was capable at the time of the gift; and, therefore, when the gift was made she took nothing but in expectancy, when she became heir *per formam doni*[i],

h See Cruise's Law of real Property, s. 13. 14. Ibid. 3. 409.

i Co. Litt. 26. b.

Now the difficulty which remains to be explained, in this case, is, how Maude could take? She claimed in the character of heir to her father; but the estate never having attached in the father, she consequently could not claim in the quality of heir by "descent" from him; neither could she claim by "purchase;" because, the fee-tail having previously vested in Robert, the description in the limitation had been already satisfied. So essentially, indeed, does this sort of succession differ from a "purchase," that the only mode of asserting the title under it, is by the supposition of a descent in a writ of *formedon*, brought for the recovery of the estate; a mode of recovery which at once extends and confines the succession to those who would have taken if the estate had descended from the ancestor. The court got rid of the difficulty by considering the estate as a quasi-entail, having the quality of a *purchase* in point of acquisition, as not being derived from or through the ancestor, but, in regard to its course of devolution, having the quality of a *descent*, in the same manner as if it had been an estate originally vested in the ancestor, descendible from him to his heirs, according to the nature of the description.

Again:—"If a woman maketh a gift in tail, reserving rent to her and to her heirs, and the donor taketh husband, and hath issue, and the donee dieth without issue, and the wife dieth, the husband shall not be tenant by the curtesy of the rent; for that the rent newly reserved, is by the act of God determined, and no state thereof remaineth[k]."

Now in what sense, I would ask, is the student to understand this doctrine? For, supposing the donee to die

k Co. Litt. 29. a.

without issue, in the life-time of the wife, the estate tail being spent, the reversion would come into possession, and, consequently, after the wife's death, the husband would be tenant by the curtesy of the land, which, evidently, could not be Lord Coke's meaning.

In order to clear up this difficulty, I should transpose the words, "the donee dieth," &c. and read "the wife dieth," and then, "the donee dieth without issue," &c. And this I should explain as follows:—If a woman maketh a gift in tail, and afterwards taketh husband, and hath issue, and dieth, leaving the husband tenant by the curtesy of the rent, then, upon the death of the tenant in tail without issue, the husband shall have no further title as tenant by the curtesy; for, the estate tail being determined, so likewise is the rent which was reserved out of it; and the reversion he cannot have, because it never was in possession during the coverture.

Again; let us take the next proposition:—"But if a man be seised in fee of a rent, and maketh a gift in tail general to a woman, she taketh husband and hath issue, the issue dieth, the wife dieth without issue, he shall be tenant by the curtesy of the rent, because the rent remaineth. The diversity appeareth[1]."

Now I apprehend the meaning of this proposition to be as follows:—Suppose a woman to be grantee in tail of a rent, of which there is a reversion in fee in the donor; in this case, if she taketh husband, and hath issue, and the issue dieth, and then the wife dieth without issue, the husband shall be tenant by the curtesy of the rent. Why? Because the fee of the rent still subsists, and in

1 Co. Litt. 30. a.

allowing the tenancy by the curtesy, the law does not, by implication, give a longer continuance to the rent than it had at its original creation; for the donor substantially limited a rent in fee[m]. In distinguishing between this and the preceding proposition, it is to be remarked, that, in this case, the wife had fee-tail in the rent, and, consequently, having also had issue, which by possibility might have inherited, the husband shall be tenant by the curtesy. But, in the former case, the wife had not fee-tail in the rent, but only a qualified or base fee, determinable upon the tenant in tail dying without issue. And herein the diversity is apparent.

Again, let us take the following section:—"if a man make a feoffment in fee of his lands, holden by knight's service, to the use of such person and persons, and of such estate and estates, &c. as he shall appoint by his will; in this case, by operation of law, the use and state vests in the feoffor, and he is seised of a qualified fee. In this case, if the feoffor limit estates by his will, by force and according to his power, there the uses and estates, growing out of the feoffment, are good for the whole, and the last will is but directory. But, in that case, if the feoffor had devised the land (as owner thereof,) without any reference to the feoffment and power thereby given, then taking effect by the will, it is void for a third part; but if he had formerly conveyed two parts to the use of his wife, &c. and after devised the residue by his will, without any reference to his power by the feoffment, yet this will shall enure to declare the use upon the feoffment; because he had no power as owner of the land to devise any part of it. But if the feoffment had been made to the use of his last will, although he devise a third part of the land

[m] See the note (258) to Co. Litt. 298. a.

with reference to the feoffment, yet it taketh effect only by the will, and not by the feoffment[n].

I should explain as follows: "before the statute 12 C. 2. c. 24. which converts tenure by knight's service into socage tenure, if a man made a feoffment in fee, of his lands held by knight's service, to the use of such person or persons and of such estate or estates, &c. as he should appoint by will, the use and estate immediately vested in the feoffor by operation of law; for, when a feoffment is made without consideration, and the feoffor has not disposed of the profits in the mean time, the law will intend the use of the inheritance to be to the feoffor, as a thing not disposed of[o]; and, thereupon, he is seised of a fee qualified, subject to the uses to be raised by the execution of the power specially reserved; for the statute of uses (27 H. 8. c. 10.) executes the seisin to the use in the same manner, and to the same extent to which the use was limited. In this case, if the feoffor limited estates by his will, *by force of and according to his power*, the uses and estates so limited are good for the whole, because they grow out of the feoffment; that is to say, because they are served out of the seisin which is in the feoffees, while there is no use *in esse* to which it can be executed; for, wherever there is an use, there must always be a seisin somewhere, in order to feed it, or otherwise the use would fall to the ground; but when the use comes *in esse*, the seisin is instantaneously divested out of the feoffees, by operation of the statute, and executed to the *cestui qui use*. And the last will was but directory; for, it did but direct and appoint in what manner the uses were to enure, in execution of the power specially reserved." But, if the feoffor, (in the same case,) had devised the land as owner thereof, *without reference to the feoffment and power thereby given*, then taking effect by

[n] Co. Litt. 111. b. 112. a. [o] Co. Litt. 271. b.

the will, the limitation would have been void for a third part, because, by the stat. 32 and 34 H. VIII. (of wills,) a devise of lands held by knight's service was declared to be void for more than two thirds[k]. The distinction is, that, in the eye of the law, this is the exercise of a power operating as an original conveyance, and not merely by way of appointment. For if he had formerly conveyed two parts to the use of his wife, &c. and after devised the residue, by his will, *without any reference to the power by the feoffment*, yet the will enured to declare the use upon the feoffment; because, in this case, he did an act which his power authorized him to do, but which he was not authorized to do without resorting to his power; for, having reserved but a power of *appointment*, he had no longer any power, as *owner of the land, to devise any part of it.* The law, therefore, considers the will, under these circumstances, to be a substantial execution of the power, notwithstanding the informality of not referring to or noticing the power. But if the feoffment was made *to the use of his last will*, although he devised the land *with reference to the feoffment*, yet the limitation takes effect only by the will, and not by the feoffment; for this was not an appointment in execution of a *power specially reserved*, but the exercise of a *power arising from an interest*, and operating as an original conveyance. And so it is at this day; if a feoffment is made to such uses as the feoffor shall appoint by will, when the will is made, the appointee is in by the feoffment; but if a feoffment is made to the use of the will of the feoffor, when the will is made, the devisee takes under the will, and not by the feoffment. And as of a feoffment to uses, so it is of any other conveyance which operates by transmutation of the possession, as fine, recovery, &c[l].

k Co. Litt. 111. b.

l Co. Litt. 271. b. And see the note 231.

THE END.

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